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IN THE

Supreme Court of the United States

October Term, 1943

—o—

NO. 409

—o—

TENNESSEE COAL, IRON & RAILROAD COMPANY, Et al.,

Petitioners,

vs

MUSCODA LOCAL NO. 123, Affiliated with INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, Et al.,

Respondents.

—o—

BRIEF FOR PETITIONER

TENNESSEE COAL, IRON & RAILROAD CO.

—o—

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BRIEF FOR PETITIONER

TENNESSEE COAL, IRON & RAILROAD CO.

On certiorari to the United States Circuit Court of Appeals of the Fifth Circuit to review the decree of that Court entered on the 16th day of March, 1943, as modified on the 27th day of July, 1943, (R. 4997-5011) modifying and affirming as modified by a divided Court a decree of the District Court of Alabama entered on the 10th day of September, 1941.—(R. 568-9).

I

OPINIONS BELOW

The opinion of the District Court (R. 494-506) is reported in 40 Fed. Supp. 4.

The opinion of the Circuit Court of Appeals (R. 4938-4942) is reported in 135 Fed. (2d) 320.

The opinion of the Circuit Court of Appeals denying petitioners' petition for rehearing (R. 4997-5010) is reported in 137 Fed. (2d) 176.

The opinions of the Circuit Court of Appeals appear in the Appendix to petitioner's petition for a writ of certiorari at pages 64 to 77 and 77 to 95.

II

JURISDICTION

The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, 28 U. S. C. 347, as amended by the Act of February 13, 1925.

III

PARTIES

The petitioners are operators of underground iron ore mines in Alabama. They brought separate actions for declaratory judgments under the provisions of the Federal Declaratory Judgments Act, Section 274 (d) of the Judicial Code, 28 U. S. C. 409.—(R. 25, 116, 177). The actions were consolidated for trial.—(R. 487).

Philip B. Fleming, Administrator of the Wage and Hour Division of the United States Department of Labor, was permitted on his own motion to intervene.—(R. 304-5).

It was admitted and found by the District Court that local unions named as defendants "fairly represent the class of underground ore mining employees of the plaintiffs."—(R. 565).

IV

QUESTION INVOLVED

The fundamental question involved is whether the Fair Labor Standards Act of June 25, 1938, Chap. 678, Sec. 152, Stat. 1060, requires so-called "portal to portal" travel time to be included in the computation of the "work week" prescribed by the Act.

The phrase "portal to portal" includes all the time spent underground by the miners, exclusive of the lunch period. The phrase "face to face" includes the time spent at the usual working places. The phrase "travel time" includes all the time spent by the miner in getting from the mouth of the mine to the usual working places and returning therefrom to the mouth of the mine.

V

THE STATUTE

The pertinent provisions of the Act are as follows:

"Section 7. Maximum hours.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

"(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

"(2) for a workweek longer than forty-two hours during the second year from such date, or

"(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

VI

STATEMENT

1. *Events leading to the commencement of the suits.*

Apparently no one thought when the Fair Labor Standards Act was passed that the Congress had intended to invalidate the method of computing work time that had uniformly prevailed in the bituminous coal and iron ore mining industries as long as any one can remember or to invalidate or impair the obligation of agreements fairly arrived at by the process of collective bargaining.

Before the Act took effect and on October 6, 1938, the International Union of Mine, Mill and Smelter Workers, affiliated with the CIO, entered into a written contract with the Tennessee Company which defined the work day thus:

> "Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.
>
> "The eight hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."—(R. 107).

Among the signatories were C. J. McDaniel, E. T. Patterson and J. M. Lemley, witnesses for the respondents; Reid Robinson, International President; Van D. Jones, International Representative, and others, and there were present during the negotiations Lee Pressman, the General Counsel of the International Unions and one of the attorneys for the respondents herein, and William Mitch, Regional Director of the CIO and President of District No. 20, United Mine Workers of America.—(R. 2447-8).

By its terms the contract was to remain in effect until changed or terminated by either party on ten days' notice. It remained in full force and effect until May 5, 1941, when in compliance with the opinion of the Administrator, another agreement was made which provided that the travel time should start "when the employee is required to report for transportation at the entrance of the mine," and should end "when he returns to that point," and which contained the following provision:

> "It is understood that the above inclusion as a part of the day's work of the traveling time reasonably necessary for the employee to go to and from his usual working place has been herein agreed to by the Company in compliance with the opinion rendered by the Administrator of the Wage and Hour Division of the Department of Labor which becomes effective May 1, 1941. The Company denies the correctness of said opinion. Suits are now pending for the judicial determination of this question. It is, therefore, agreed that if and when there is a final judicial interpretation (this agreement then being in existence) overruling or modifying the opinion of the Administrator or in the event the Administrator changes his opinion or the law is amended, the question of whether or not the definition of the workday herein agreed to shall thereupon be changed so as to comply with the court's decision or the law as interpreted or amended shall immediately become a question for negotiation, and, if not settled between the parties by such negotiation within thirty (30) days after such final judicial interpretation or change or amendment has occurred, neither of the parties hereto shall be further bound or obligated by the definition of the day's work as herein contained, and the parties shall proceed as hereinafter provided for in Section 15 hereof."—(R. 4625, 4627-8).

The Act was enacted on June 25, 1938, and became effective on October 24, 1938.

On three prior occasions, to-wit, on *October 19, 1933,*

April 13, 1934 and June 13,1935, the International Union had included among its demands that the travel to the place of work be on Company time and that the men leave on their own time.—(R. 888). It is obvious that that demand was not seriously made since it is undisputed that at the subsequent meetings held in collective bargaining the subject was not even brought up for discussion.—(R. 870, 876-7, 882). As early as May 26, 1936, the Union submitted a proposed wage agreement in which the "face to face" basis of wage computation and payment in the exact language as used in subsequent written wage agreements executed between the Unions and the Tennessee, Sloss and Woodward Companies was proposed.—(R. 3632).

As late as *July 9, 1940,* Earl E. Houck, Director of the Legal Department of the powerful United Mine Workers of America, and a Committee of the Operators addressed a letter to the Administrator asking him to accept the definition of working time in the Appalachian Agreement as complying with the provisions of the Act; which they said embodied "the custom and traditions of the bituminous mining industry."—(R. 4715).

That definition was:

> "Section 4—Hours of Work. Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work. Time and one-half shall be paid for all overtime in excess of eight (8) hours in any one day or for all overtime in excess of forty (40) hours in any one week.
>
> "The eight (8) hour day means eight hours of work in or about the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid on the tonnage basis."

The letter also said, referring to the "face to face" method agreed to:

"This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense."—(R. 4712).

The letter then proceeded to give many cogent reasons in support of that method, all equally applicable to the iron ore industry, and said that:

"As mines grow older, the working places move farther and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working places"

and that the adjustment of wage rates to any new standard of measurement

"would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States."—(R. 4713-14).

The Houck letter is set out in the Appendix.

On *July 27, 1940*, on the basis of that letter, the Administrator issued a public release in which he said "that the practice of computing working time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable," explaining that "face to face" meant the productive work performed after the miner arrived at his usual working place, excluding the time spent in traveling from the portal or entrance of the mine to the place of work and the time spent in returning from the working place to the portal in the evening.—(R. 4717).

The opinion of the Administration, the Houck letter and all evidence offered by appellants relating to the coal mining industry were excluded from evidence.

On *March 23, 1941,* the Administrator announced what he called a "Modified Portal to Portal Wage Hour Opinion," in which he said that "the work day in underground metal mining starts when the miner reports for duty as required at or near the collar of the mine and ends when he reaches the collar at the end of the shift" and also includes "the aggregate of the time spent on the surface in obtaining and returning lamps, carbide and tools, and in checking in and out."—(R. 76-8).

The District Court agreed with the Administrator on both points.—(R. 568). The Circuit Court of Appeals eliminated the time spent in obtaining and returning lamps, carbide and tools and the time spent in checking in and out.—(R. 4947 and 4841-42).

The Administrator concluded his announcement by saying:

> "That because the Division had not heretofore taken a definite stand on the various problems involved, it would not seek to compel the payment of restitution from mine owners who have been operating on a face to face or other bases inconsistent with the principles outlined in the report. This enforcement policy of the Division cannot, however, interfere with the rights of employees or their representatives to sue under Section 16 (b) of the Fair Labor Standards Act."—(R. 78).

The Administrator, in memorandum in opposition to petitioners' petition for writ of certiorari, places reliance on the report of the Wage and Hour Division on which his opinion was based (Exhibit A to Petitioner's Complaint, R. 75 at 85-9) in support of his assertion (contrary to the evidence—pp. 10-12, infra) that the "traditional practice" of computing and paying wages on the "face to face" basis had not existed in the industry.—(Administrator's Memorandum in Opposition to Appellants' Petition for Certiorari, p. 14).

While these ex parte statements can not be considered as evidence of their truth, the report states, "The only important group of mines now operating on a face to face basis are those in Alabama."—(R. 86). All the respondents' witnesses who testified on the subject testified that the "face to face" basis traditionally existed not only in the ore mines in Alabama but also in all the ore mines elsewhere in the United States.—(pp. 10-12, infra).

The report purports to have been based on an investigation "including field surveys and questionnaires, reports by the Division's Regional Directors, and public conferences before the undersigned at Salt Lake City * * * and Birmingham."—(R. 80).

Upon the announcement of the Administrator's opinion the Unions, representing approximately 6,000 underground employees, demanded the payment of overtime compensation for all travel time since October 24, 1938, the infliction upon the appellants of the severe penalties of Section 7 of the Act and demanded their future compliance with the Administrator's opinion.

Thereupon, on *April 4, 1941,* petitioners filed in the District Court their separate actions for declaratory judgments, or, in the alternative, by injunctions, to prevent the bringing of a multiplicity of suits by their underground iron ore mining employees for compensation for so-called "portal to portal" travel time, and to obtain a declaration that as to past and future there was no obligation to consider the portion of the time spent by the underground employees in traveling to and from their usual places of work and while not engaged in physical work or service as time worked within the meaning of the Fair Labor Standards Act of 1938.

Interrogatories were directed to the Administrator and motions were made to require the production of the evi-

dence on which he based his opinion, but the objections of the intervener to the interrogatories were sustained and the motion to produce overruled on the ground that the evidence was confidential.—(R. 381-2).

2. *Tradition and Custom.*

The Circuit Court of Appeals said:

> "It may be conceded, *arguendo,* that for twenty-five years prior to 1938 iron-ore miners had not been compensated for travel time * * *."—(R. 4941).

The undisputed fact is that as long as any one can remember "portal to portal" travel time has not been included in the computation of working time, either in the iron ore or the bituminous coal mines in any of the principal states producing either iron ore or coal or both.

The Administrator under an oral commission took the evidence of a number of witnesses who worked in the underground ore mines of the Lake Superior Region. Their depositions (R. 4032-4416) were offered in evidence by the petitioners and admitted over the objection of the respondents.—(R. 2221). These witnesses uniformly testified that they were at all times paid on the "face to face" basis.—(R. 4081, 4108, 4133-4, 4230, 4251-2, 4279, 4327).

As typically illustrative of this testimony, we quote:

> "Q Now, from the time you started working in '24, until May 1, 1941, what you called the collar-to-collar plan never was in force or operation, was it?
>
> "A No.
>
> "Q You didn't have it at all during that whole period of time?
>
> "A No.
>
> "Q Your time was computed and you received your

pay and the company men, or day men, whatever you call them, received their pay on the basis of eight hours, not including traveling time?

"A Yes.

"Q That is right, isn't it?

"A That is right.

"Q And that was, so far as your experience is concerned, the universal custom during that period of time?

"A Yes."—(Witness Burck; R. 4133-4).

Joseph Bovitz, who had been a miner in the underground iron ore mines of Minnesota since 1907, testified:

"Q Now, in Minnesota, though, it never has been the practice to pay the miners for travel time, has it?

"A No.

"Q And you have known about it for 30 years of your own knowledge?

"A Yes.

"Q And you know that the companies never did pay for the travel time up until May 1, 1941. That is correct, is it not?

"A Yes."—(R. 4251-2).

Petitioners also proved that the "face to face" basis had traditionally existed in the States of Wyoming and Colorado.—(R. 4417, 4419, 4420, 4436).

The same practice has uniformly prevailed in Alabama.—R. 798, 840-2, 1096-7, 1163-66, 1236, 1276, 1299-1300, 1422, 1484-85, 1551-2, 1632, 1702, 1767-4, 1794, 1864, 2152, 2296, 2300, 2458, 2514, 2598-9, 2671, 2849, 2898-9, 3058-60, 3122-3, 3145, 3162). All respondents' witnesses so testified. As typically illustrative of this testimony we quote the following:

"Q Now, never in your experience as a miner since

you have been mining in Alabama—you have never received any pay for the time you spent in traveling to and from the place where you produced the ore, have you, Mr. Butler?

"A I have not.

"Q And the custom and practice in all the mines you have ever worked in during all that period of time has always been not to pay the men for any time spent in traveling to and from the place where they produce the ore?

"A Yes, sir."—(Witness Butler, R. 3058-60).

• • • •

"Q That didn't include the time you spent riding down and back from your working place?

"A No, sir. It was the policy face to face.

"Q Has that always been the policy out there, face to face?

"A As far as I know.

"Q For everybody?

"A For everybody." — (Witness Trammell, R. 3122-3).

The petitioners tendered evidence of a similar invariable custom in the bituminous coal mines by various witnesses, (R. 1976, 2047, 2049, 2108, 2110, 2111, 2112, 2114-17, 2132, 2154, 2170, 2178, 2187, 2192, 2195, 2203-4, 2214-15), but the evidence was excluded.—(R. 2079).

The facts, however, are of such common knowledge that the Court will take judicial notice of them.

The practice of transporting the men to and from the unloading stations in the coal mines and the method of reaching the working places as described in the Houck letter (R. 4713) does not differ essentially from that in the iron ore mines, and the same problems exist in both, ex-

cept, as is commonly known, and as shown by the offered evidence, the coal mines are gaseous and the iron ore mines are not, and the traveling distances, and the incidental perils and discomforts, are greater in the coal mines.

3. *Recognition of the traditional "face to face" method by public and quasi public authorities, relevant statutory enactments, and administrative rulings on eight-hour and like Laws prior to the enactment of Fair Labor Standards Act.*

Evidence was tendered which showed the following:

(1) In arbitration proceedings held in the City of Birmingham in 1903 presided over by Judge George Gray, a representative of the Union thus stated the traditional method:

"The day is reckoned from the time the miner commences work in the morning at seven or a quarter past seven, until half past four. The time is started from the time the driver hitches to the car until he unhitches from the car and from the time the miner gets to the face of the coal until he leaves the face of the coal.

"Question: And where it applies to the miner, it is from the time he gets to the face of the coal until he leaves the face of the coal?

"Answer: Yes, sir, that is where they count it.

"Question: Where the eight hour day is in force, it counts from the time men actually get to their working place in the mine until they leave it?

"Answer: Yes, sir.

"Question: While walking in there you are not on company time?

"Answer: No, sir."—(Offer of Proof by Ed Flynn, R. 2193).

The arbitration resulted in a wage agreement on the "face to face" basis.

(2) On *October 25, 1917*, a Board of Arbitration presided over by Rembrandt Peale—in an award approved by U. S. Fuel Administrator Garfield thus defined the work day:

> "An eight hour day means eight hours work at the usual working places of all classes of employees. This shall be exclusive of the time required in reaching such working places in the workings and departing from the same at night."—(R. 4694-5).

(3) On *March 9, ~~1940~~ 1920*, President Wilson transmitted to Mr. Brewster, Chairman of the Operators' Scale Committee, and to Mr. Lewis, President of the United Mine Workers of America, a copy of the report and award of the Bituminous Coal Commission, on the basis of which an agreement was reached between the Operators and the Union on March 31, 1920, which included the exact definition last above quoted.—(R. 4696, 4759).

(4) On *September 18, 1933*, President Roosevelt, on the recommendation of Hugh S. Johnson, Administrator of NIRA, approved the Code of Fair Competition for the Bituminous Coal Industry containing the following definition of a day's work:

> "Seven hours of labor shall constitute a day's work and this means seven hours work at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid on the day or tonnage or other piece work basis."—(R. 4701, 4705).

(5) On *September 21, 1933*, the President approved the Appalachian Agreement, which defined the work day as follows:

"Eight hours of labor shall constitute a day's work. The eight hour day means eight hours' work in the mines at the usual working places for all classes of labor exclusive of the lunch period."—(R. 4787).

(6) Three states had by plain and express statutes included travel time by a limitation of permissible hours underground, viz: Utah by Chap. 59, Laws of Utah, 1937; Arizona by Sec. 1958, Arizona Revised Codes, 1928; Nevada by Sec. 10237, Nevada Compiled Laws.

(7) In *1917* the Alaska Legislature passed an Act which provided that the period of employment in underground mines

"shall not exceed eight hours within any twenty-four hours, except on such days as change of shift is made, excluding, however, any intermission of time for lunch or meals, or otherwise going to, or from the place where the work is actually carried on, whether going to or coming from the place of work be in going on, or off shift, or in going to or returning from meals or lunch. It being the intention of this article to limit the hours of employment in any twenty-four hours to eight hours of actual labor at the face or other place or places where the work or labor to be done is actually performed."—(Section 2132, Compiled Laws of Alaska).

(8) In *1909* California enacted an eight-hour law for persons employed in underground mines.—(Stat. 1909, p. 279, c. 181, approved March 10, 1909).

The Supreme Court of California sustained its constitutionality (Ex Parte Martin, 106 Pac. 235), and in construing it held that the eight hours included the work at the face of the mine and excluded travel time, saying:

"Giving to the words of the act their ordinary and reasonable meaning, the limitation of time is to be construed as referring to the time when men are actually en-

gaged in work, not when they are going to and from their work. There is nothing in the language of the act which would justify a more restricted interpretation."—Ex Parte Martin, 106 Pac. 238-9).

Subsequently at least ten other states enacted substantially similar statutes, and presumably adopted the construction of the Supreme Court of California, viz: Washington (Sec. 8794 Remington's Revised Statutes of Washington); Colorado (Sec. 101, Chap. 97, Colorado Statutes Annotated, 1935); Kansas (Sec. 49-282 Gen. Statutes of Kansas Annotated, 1935); Idaho (Section 43-704, Idaho Code Annoted, 1932); Wyoming (Chap. 63-103 Wyoming Revised Statutes, 1931); Oregon (Oregon Laws, 1920, Chap. 8, p. 6716); Oklahoma (Statutes, 1931, Sec. 13717, Constitution, Art. 23, Sec. 4); Missouri (Missouri Revised Statutes, 1939, Sections 10167-9); Montana (Revised Codes of Montana, 1935, Vol. 2, 302-79; Constitution of Montana, Art. XVIII).

Our research has not disclosed any construction of such statutes contrary to that of the Supreme Court of California, with the exception of *Butte Miners Union No. 1 v. Anaconda Copper Mine Company* (1941), 112 Mont. 418, 118 Pac. (2) 148.

In this case the Supreme Court of Montana, by a divided Court, held, rather apologetically, that travel time of underground copper mine employees should be included as a part of the work day, and based its judgment entirely upon the Modified Portal to Portal Opinion of the Administrator, stating, in effect, that a contrary ruling would be in conflict with the "public official act of the Executive Department of the United States" and would result in administration and enforcement in a condition that would be "for all practical purposes inconsistent and chaotic." The dissenting opinion called attention to the fact that the

Legislature of Montana had on five separate occasions pronounced the policy of the state by refusing to amend the Montana statute so as to provide by express language that all underground time should constitute a part of the work day, and concluded with the statement that "the courts can not do by construction what the Legislature refused to do by amendment."

(9) Many administrative rulings have been made construing eight-hour and like statutes as applying only to *effective labor.*

Opinions of the Attorney General on October 11, 1906 (R. 4646) and on May 11, 1908.—R. 4654).

Ruling of the Comptroller of the Treasury on June 12, 1921.—(R. 4658).

Rulings of the Comptroller General on November 11, 1929 (R. 4661), on June 18, 1935 (R. 4662), and on October 28, 1937.—(R. 4669).

The latter ruling involved the transportation of government employees from San Francisco to their places of work on Angel Island and return on a government steamer.

(10) Under the Bituminous Coal Act of 1937 (15 U. S. C. 828-851), the basis of minimum prices was "the weighted average of the total cost" of production, and the cost of labor was specifically included as one of the items upon which total cost must be computed. The "weighted average cost" base was determined in Docket 15 from cost compilations covering the calendar year *1936* and the first nine months of *1937*. The hearings, however, were not concluded until *April, 1939*, and the Director's findings and order establishing effective minimum prices were not issued until *August 8, 1940*. Later adjustments of the weighted average cost (cf. Docket 21) were made. It was the universal practice in making the reports to the Com-

mission to include only labor costs for "face to face" work, and equally evident that the minimum prices for the sale of coal were predicated on these costs.

4. *Recognition of the traditional "face to face" method by public and quasi public authorities and administrative rulings relating to the Fair Labor Standards Act and acts of similar purport subsequent to the enactment of the Fair Labor Standards Act.*

Evidence was admitted or tendered on the trial of the case, and subsequent events have occurred since the trial of such common knowledge that the Court will take judicial notice of them, which showed the following:

(1) Appellants and their employees (represented by strong national unions) and the iron ore mining industry throughout the United States continued, after the enactment of the Act, to operate on the "face to face" basis; this traditional concept of the day's work continued to be embodied in wage agreements; and the employees received thereunder increases in wages, additional pay through incentive plans, and other valuable considerations. Some of these agreements were executed as late as September 11, 1940, December 23, 1940, and March 17, 1941.—(T. C. I. Exhibit No. 14, R. 105; Sloss Exhibit No. 15, R. 3804; Sloss Ex. No. 34, R. 3916; Sloss Exhibit No. 18, R. 152; T. C. I. Exhibit No. 20, R. 3737; Sloss Exhibit No. 36, R. 3939; Exhibit C to Sloss Petition, R. 166).

(2) On *July 27, 1940,* the Administrator of the Act approved the "face to face" basis of computation and payment of wages for the bituminous coal mining industry.—(R. 4717).

The Administrator has never changed or departed from this ruling.

The substantially parallel conditions which existed in the coal mines and the ore mines could have left no doubt in the mind of any reasonable person that the coal mining industry opinion would be followed in the case of the iron ore mining industry.

(3) The Administrator induced or allowed the iron ore mining industry to continue the computation and payment of wages on the "face to face" basis until he rendered his Modified Portal to Portal Opinion on March 23, 1941, and stated in the release of the opinion that because the Division had not heretofore taken a definite stand it would not seek to compel the payment of restitution from mine owners who had not been operating on the "face to face" basis.—(R. 76, p. 8, supra).

(4) The Attorney General, charged with the enforcement of the Act, has never sought to enforce the "portal to portal" interpretation in reference to iron ore or coal mines.

(5) The coal mining industry continued until recently to compute and pay wages on the "face to face" basis either under collectively bargained wage agreements or directives of the government.

(6) Since the rendition of the opinion of the Circuit Court of Appeals the following occurrences have happened which are of such common knowledge that the Court will take judicial notice of them:

One of these facts of common knowledge is referred to in the reply of respondent Unions (p. 6) to the petition for writ of certiorari in the following language:

> "It is a matter of common knowledge that the contracts between the coal operators and the mine workers expired on March 31, 1943, and that 'portal to portal' pay subsequent to that expiration date has been under negotiation."

We respectfully direct the Court's attention to the following additional matters of common knowledge:

(a) No demand for "portal to portal" travel time was made in the *1941* negotiations between the International Policy Committee of the United Mine Workers of America and the Coal Operators.

(b) The wage agreement executed between the Union and the Operators in 1941 expired on *March 31, 1943,* and negotiations for a new contract began on *March 10, 1943.*

(c) The original decision in this case was rendered on March 16, 1943.

(d) In *August, 1943,* class actions were filed by the United Mine Workers of America in the District Courts of Alabama, Kentucky and West Virginia seeking to recover for the employees overtime compensation for "portal to portal" travel time since the effective date of the Act. These cases are pending.

(e) On *March 19, 1943,* the National Policy Committee of the Union amended its demanded definition of hours of labor so that the existing demands which until this time had been on the traditional "face to face" basis should be modified "to conform with the basic legal requirements of the industry and the maximum hours of work time provisions be amended to establish "portal to portal" for starting and quitting time for all underground workers."

In presenting this demand John L. Lewis, President of the Union stated:

> "The Mine Workers desire to take advantage of the law which, under the Alabama decision, grants them the right to be paid for the time they are in the mines."

(f) On *March 26, 1943,* Mr. Lewis, appearing as a

witness before the Senate Committee investigating the national defense program, said:

"I wonder what you suggest, Senator, you having a very alert, capable mind on these things, in the light of the decision of the Fifth Circuit Court of Appeals on the portal-to-portal issue, that the mine workers should do. The Court says that we cannot make a contract and contract away the rights by the statute. I am judicially estopped from making an agreement that does not comply with the mandate of the Court."

(g) On *June 18, 1943,* the National War Labor Board issued its directive denying the demand of the Mine Workers for the establishment of "portal to portal" for starting and quitting time, and directed that the contracts which expired on March 31, 1943, should (with certain amendments not relating to travel time) remain in force and effect until *March 31, 1945,* thus experssly providing for the carrying forward of the traditional agreement for the computation and payment of wages on the "face to face" basis.

The following excerpts are taken from the opinions and statements of the National War Labor Board in support of the above mentioned directive:

"In the second place, the whole economic structure of the bituminous coal mining industry has been built upon the payment of wages on the 'face to face' basis. To now reconstruct the maximum hours and working time provisions applicable to bituminous coal mining, so as to cure the inequality due to different individual travel time, would create utter confusion in the economics and in the wage structure of the industry, which could only adjust itself to this new system over a period of years. The considerations involved in such a change, both economically and with reference to the fair treatment of the individual workers, are so complex that they could be satisfactorily worked out only by a long period of collective bargaining, if at all.

Defense Program.

Proceedings Senate Committee Investigating National

"In normal times of peace it would be possible for the interested parties, and for impartial men, to give reasonable consideration to these complex problems, but at the present time, when the country, engaged in a wartime struggle for its very existence, the uncertainties and disturbances involved in working out such a plan would be intolerable. A time of war is no time to settle long standing and complex questions of this character. This is particularly true, as we pointed out in connection with the north-south differential in the Cotton Textile Cases, when a disturbance of long standing relationships established by years of collective bargaining would require us to disregard our responsibilitity to stabilize wage rates in conformance with the national stabilization program. .

• • • •

"In the bituminous mines involved in this dispute the parties have agreed throughout more than fifty years of collective bargaining that wages should be paid on the 'face to face' basis; that is, on the basis of time spent at the working places. On July 18, 1940, the Administrator of the Wage and Hour Division of the Department of Labor, following representations made jointly to him by the Operators and the United Mine Workers, expressed the opinion that the practice of computing working time on a 'face to face" basis in the bituminous mining industry would not be unreasonable under the provisions of the Fair Labor Standards Act.

"The Appalachian agreements of 1941 were entered into between the parties in the light of this ruling. They retained the old maximum hours and working time provisions in which compensation was based on the 'face to face' principle. The Mine Workers chose at that time 'face to face' rather than 'portal to portal' pay for their own reasons which they had given to the Wage and Hour Administrator in the letter of July 9, 1940. They agreed to put up with the inequality that comes from the fact that individual mine workers have to spend different periods of time in travel.

"When the negotiations for the new contract were initiated in March of this year the mine workers demand-

ed, as they had a right to do, that the new contract should make provision for additional compensation for travel time. Their demand was that the operators should pay for travel time 'to conform with the basis and legal requirement for the industry.' On August 13, 1941, the United States District Court in Alabama had decided that all time spent underground in iron ore mines was working time and should be included in the computation of the employees' work week under Section 7 of the Fair Labor Standards Act, and on March 16, 1943, this decision was affirmed by the Fifth Circuit Court of Appeals.

* * * * *

"Having denied the general wage increase in its directive order of May 25, the Board pointed out that the claim of the Mine Workers for travel pay involved the assertion of a legal right under the Fair Labor Standards Act. A legal claim of that kind, if it has any foundation at all, is an unknown liability hanging over the business of every bituminous coal operator, and there is nothing more destructive of business than hidden liens and unknown liabilities."

The opinions of Chairman Davis and Member Morse are set out in the Appendix.

(h) On *July 30, 1943,* in the District Court of the United States for the Western District of Virginia the Jewel Ridge Corporation, operating coal mines in Southwestern Virginia, filed its petition for a declaratory judgment on the question of "portal to portal" pay to underground miners, and prayed for a declaration that travel time was not a part of the work week under Section 7 of the Fair Labor Standards Act.

During the trial of this case the Union amended its answer which, as originally filed, had claimed travel time since the effective date of the Act, so as to disclaim payment for travel time which had occurred prior to March 31, 1943, the expiration date of contracts which provided for the "face to face" basis.

The trial of this case has now been concluded and is awaiting the decision of the District Judge.

(i) On *September 23, 1943*, the Mine Workers Union and the Illinois Coal Operators executed a second wage agreement, subject to the War Labor Board's approval and to an increase in minimum coal prices. This agreement was submitted to the War Labor Board and approved by it, in principle, on October 26, 1943. The decision concludes with this paragraph:

> "Furthermore, if and when the operators and the mine workers in cooperation succeed in reducing the average travel time for all the mines covered by the Agreement below 45 minutes a day, and simultaneously increasing the productive working time at the face, a contract could be approved allowing the miners a further increase in their daily wage.. If the average travel time can thus be reduced to 30 minutes a day, the mine workers could be paid the full amount of the proposed Illinois Agreement. If the Illinois Agreement is modified as above indicated it will be approved by the War Labor Board."

(j) On *November 29, 1943*, the president of the United States, recognizing the differences which, as a matter of common knowledge, existed in different mines, appointed a special committee to conduct a study of travel time in the underground bituminous coal mines having contracts with the United Mine Workers of America in order to ascertain the "average travel time in these mines." This committee is functioning at the present time.

(k) During the "portal to portal" controversy the bituminous coal mines were closed three times by strikes. The government twice had to assume control of them to secure production of coal and it is still operating them as this brief is written. It has been publicly announced, how-

ever, that they are to be returned to the operators under negotiated contracts providing for the computation of wages under complicated formulae based on an arbitrary allowance to all employees alike of forty-five minutes of travel time with the rate for travel time being two-thirds that for productive work time.

Thus, through the process of collective bargaining with administrative approval and authority, partial rates for some travel time are to be paid to all employees alike regardless of the actual travel time of each.

5. *The legislative history of the Fair Labor Standards Act of 1938.*

The Court will take judicial notice of the following:

(1) The National Industrial Recovery Act, enacted by the Congress on June 16, 1943 (48 Stat. 201) was the progenitor of the National Labor Relations Act and of the Fair Labor Standards Act.

This Court, on May 27, 1935, declared NIRA unconstitutional.

The Congress subsequently, for the purpose of legislating in reference to the two fundamental objects of NIRA, enacted the National Labor Relations Act and the Fair Labor Standards Act, the former Act covering the protection and maintenance of the rights of collective bargaining, and the latter minimum wages and maximum hours.

The codes of fair competition adopted or promulgated under the provisions of NIRA became complete employer and employee charters covering minimum wages and maximum hours.

The Bituminous Coal Code, stemming from negotiations between the United Mine Workers of America and the various coal associations, was approved by the President of

the United States, by the Administrator and by the industry. The code thus adopted expressly provided for computation and payment of wages on the traditional "face to face" basis.—(R. 4705).

(2) Representative Keller, a member of the Conference Committee, in debate preceding the final passage of the Fair Labor Standards Act, June 14, 1938, said:

> "This bill eliminates the defects and preserves the best features of the National Industrial Recovery Act. In doing so a better procedure is provided, so that no rights may be affected without an opportunity to be heard. NRA put down a floor for wages and a ceiling to hours of work."—(Vol. 83, Congressional Record, Part 8, p. 9264, 75th Congress, Third Session, June, 1938).

(3) The Senate Committee in paragraph II of Report of July 6, 1937, said:

> "The right of individual or collective employees to bargain with their employers concerning wages and hours is recognized and encouraged by this bill. It is not intended that this law shall invade the right of employer and employee to fix their own contracts of employment, wherever there can be any real, genuine bargaining between them. It is only those low-wage and long-work-hour industrial workers who are the helpless victims of their own bargaining weakness that this bill seeks to assist to obtain a minimum wage."—(Senate Report No. 884).

The evidence in this case shows that the iron ore miners of the Tennessee Company for a period of time for several years prior to May 1, 1941, received an average wage of 68 cents per hour.—(R. 850-51).

(4) On June 2-22, 1937, joint hearings on the Fair Labor Standards Act were held before the Committee on Education and Labor, United States Senate, and the Com-

mittee of Labor, House of Representatives. The following excerpts from the Joint Hearings are quoted:

"MR. LEWIS: * * * My recommendation as to rate of pay is a minimum of 40 cents per hour. As to hours of work, the standard in my opinion should be 5 days of 7 hours each or 35 hours per week, with authority granted to the Board to expand to a 40-hour maximum, or to reduce to a 30-hour maximum * * *."—(p. 222-272).

"SENATOR LaFOLLETTE: * * * as I understand it, the objective of this bill as outlined in Section 23, one of them is to prevent the Board from going in and upsetting collective bargaining agreements or entering the field where collective bargaining is actually functioning in a bona fide manner, and thereby producing the result of the action of the employer and employee represented by genuine and effective labor organization."—(p. 280).

"MR. LEWIS: * * * For instance, frankly I would not want this bill to convey power to a board to order an investigation into all of the wage agreements in the mining industry right now, or to give the board power to decide that the collective bargaining agreements in the mining industry were not sound, not proper, were confiscatory, or not in harmony with the facts of the industry, and order a modification thereof. I think the power of the Board should be limited to cases which run below the level of the standards fixed by Congress. I see endless confusion in the adoption of Section 5 now. I see a drift towards the complete fixation of wages in all industry by governmental action."—(p. 281-2).

"THE CHAIRMAN: As I understand your position, boiled down, with reference to the minimum wage—I want to be sure—it is that you favor a minimum wage law written in such a way that it will preserve to the utmost the right of bargaining between employers and employees, but which will at the same time raise the low, substandard condition of millions of people, those who have been living in that sphere and have not as yet been able to elevate themselves either by their own barbaining or by collectively bagaining?

"MR. LEWIS: That is correct, Senator."—(p. 307).

(5) During the Senate debate on the bill on July 29, 1937, the following statements were made:

"MR. WALSH: Next does the bill effect collective bargaining agreements already made or hereafter to be made between employers and employees?

"MR. BLACK: It does not.

"MR. WALSH: There is one exception to that, is there not? The bill does not affect collective bargaining agreements where the hours are less than 40 per week, or where the wages are more than 40 cents per hour?

"MR. BLACK: That is correct.

"MR. WALSH: But if a collective bargaining agreement had been entered into at 36 cents per hour wages, the board would have jurisdiction to set that agreement aside and to fix, if the facts warranted, a minimum wage of 40 cents?

"MR. BLACK: The board would have jurisdiction to do it, but under the provisions of the law it would be my judgment that the board would be very reluctant, indeed, to attempt to interfere with a bona fide agreement made between employers and employees."—(Congressional Record, Vol. 81, p. 7650).

6. *The Congress has been zealous in defining the right and maintaining the results of collective bargaining.*

National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449.

Railway Labor Act, May 20, 1926, c. 347, 44 Stat. 577; 48 Stat. 1186, June 21, 1934;

Norris-LaGuardia Act of March 23, 1932, c. 90, 49 Stat. 70;

War Labor Disputes Act, June, 1943, 78th Congress.

7. *The Context of the Fair Labor Standards Act of 1938.*

The context of the Fair Labor Standards Act shows that the word "workweek" [Sec. 7 (a)] was used in accordance with the concept of the industry and in a much more restricted meaning than the words "on duty" as used in the Hours of Service Act relative to railroads (U. S. C. A., Title 45, c. 3, Sec. 62) ; or the words "arising out of or in the course of employment" [*Bountiful Brick Company v. Giles* (January, 1928), 266 U. S. 154, 72 L. Ed. 507] as generally used in workmen compensation acts; or the words "injury sustained while in the performance of his duty" as used in the compensation law as to public employees (U. S. C., Title 5, Chap. 15, Sec. 75-1) ; or the words "arising out of or in the course of employment" as used in the Longshoremen and Harbor Worker's Compensation Act (U. S. C., Title 33, Section 902) .

We quote from the Fair Labor Standards Act:

"Section 3 (g) : 'Employ' includes to suffer or permit to *work*.

* * * * *

" (j) : 'Produced' means produced, manufactured, mined, handled, or in any other manner *worked* on in any State; and for the purpose of this chapter an employee shall be deemed to have been engaged in the *production* of goods if such employee was employed in producing, manufacturing, mining, handling, transporting or in any other manner *working* on such goods, or in any process or occupation necessary to the production thereof, in any State."

Section 5 of the Act provides for the appointment by the Administrator of an industry committee for each industry, and Section 8 provides for the issuance of wage orders, and, following hearings and the recommendations of the industry committee, the fixing of the minimum rate for

the industry; and requires, in the fixing of such minimum rate, the consideration, among other relevant factors, of the following:

"(1) competitive conditions as affected by transportation, living and production costs;

"(2) the wages established for work of like or comparable character by collective labor agreements negotiated between employers and employees by representatives of their own choosing; and

"(3) the wages paid for work of like or comparable character by employers who voluntarily maintain minimum-wage standards in the industry."

Other provisions of Sections 2 and 8 of the Act emphasize the purpose of the Congress to determine these matters on an industry basis, and assure the opportunity for all members of the industry under consideration to have due notice of the hearings and full opportunity to be heard before the decisions of the Administrator, or the recommendations of the industry committee shall become effective.

In prescribing minimum wages and maximum hours for industry as a whole the Congress attempted no definition of "work" or "workweek," thus, in view of its presumed knowledge of the different concepts, customs and traditions of different industries, evidencing an intention to afford the widest scope to agreements of the parties immediately concerned.

8. *The practice and custom in the petitioner's iron ore mines.*

As in the case of the bituminous coal mines, the distances of the working places from the portals differ very greatly. The longer the mines are worked, the farther the working places become from the portals. For example, in the Spaulding Mine of Republic Steel Corporation, the working places are only five or six minutes' walk from the por-

tal.—(R. 1910). In some of the mines the travel time exceeds one hour and a half. Where the slopes and headings have been extended a sufficient distance to make walking inconvenient, the employees are transported in cars or in so-called "skips" from the mouth of the mine to the unloading stations from where they walk to their working places. Distances vary greatly in different mines, and even in the same mine.—(R. 766).

The employees called by the respondents all admitted that they had never been paid for travel time.—(pp. 11-12, supra).

The typical daily procedure as testified to by Ball, general superintendent of Tennessee Company (R. 777-807), Cameron, division superintendent, (R. 1083-1095), Brown, a mine foreman of Tennessee Company (R. 1156-1178), Neal, division superintendent (R. 2298), Scott, a mine foreman (R. 1254), Goodwin, a mine foreman (R. 1727), and Carter, a division superintendent (R. 1653), was substantially as follows:

The Company provided a bath house and locker room near the tipple where upon arriving and leaving the employees changed their clothes and took a bath if they wished. Having changed into his mine clothes on arriving, the employee purchased carbide, if he needed any, at a small house near the tipple, the Company selling it at cost, but it being optional with the employee to purchase from the company or elsewhere. He then deposited his check, a metal disc bearing a number, at the tipple office, solely as a measure of safety and identification.

The government, under the Act providing for Federal inspection of coal mines (Federal Coal Mine Inspection Act of May 7, 1941, 55 Stat. 177) has recommended coal mine inspection standards which expressly provide for an exactly similar method of checking in and out of mines.—

(U. S. Dept. of the Interior, Bureau of Mines, Information Circular No. 7204, Sec. 12 (General Practice) par. 36).

The miner then boarded whatever skip he pleased, the Company merely preventing over-crowding and filling vacancies in crews, if there were any. If an employee did not arrive at the tipple until after the regular trips were over, he was permitted to reach his working place in some other way. If, on the day shift, he was supposed to report to his foreman or head miner at the working place at 6:45. Until then he was under no supervision or direction except as to his behavior for his own safety and the protection of property.—(R. 1037, 1229, 1265, 2434-7, 2442, 2509-10, 2535, 2543, 2562, 2675, 2851, 2905, 3052).

The respondents' own witnesses testified that the employees did not come under the supervision of the foreman or head miners until they reach their respective working place.—(R. 974, 1159, 2435, 2510-11, 2561, 2645, 2893-4, 2917).

When a production crew was short of men, substitutes would be provided from the service men at the underground loading stations, and since the substitute might thus be late in arriving at the face, he was none-the-less paid full time.—(R. 963, 983-5).

The working time of the day shift was from 6:45 A. M. to 3:15 P. M., and the men were paid for eight hours even though they may not all have worked actually eight hours. For example, the "shooting" to prepare for the next day's work was at 3:10. The drilling and charging having been completed, all but those required to light the fuses were expected to leave the heading, and in practice they left at irregular intervals before 3:10 and went to the loading stations where benches were provided for them to sit until they were able to board a skip to return to the surface.

where they again changed their clothes and took a bath if they desired to do so.

One of the reasons of the District Court for finding that there had been no custom not to pay for travel time was the fact that for their own safety men were permitted to leave the working places at irregular times before the "shooting" and were paid for full time, and the District Judge thought that they thus received some pay for travel time.—(R. 497).

There were two classes of employees, (a) service men, i.e., timber and track men, motormen and transportation men, and (b) production men or heading crews.—(R. 758).

The service men in the mines of the Tennessee Company numbered approximately 60 per cent of the total underground employees (R. 758); in the Republic Mines, 46 per cent (R. 1848); and in the Sloss Mines, 36 per cent (R. 1441).

The service men reported to their foremen near the loading stations and obtained their tools from tool boxes located there, and their work day began then. The production men reported to the head miners at the face, and obtained their tools which had been conveyed there by the company, and their workday then began. The time of the production men was kept by the head miner, and of the service men by a foreman.—(R. 791, 797-8, 1047-9, 1087-93, 1095).

The employees were paid and receipted for full payment either twice or four times a month (R. 903), and the statements necessarily told them that travel time was not included in the computation of work time.—(T. C. I. Exhibits Y and V, R. 3557-3586).

The foregoing is substantially undisputed.

The respondents' evidence consisted largely of exagger-

ations of the discomforts and hazards of underground travel and alleged carrying of tools to and from the portals.

It has always been and is now the contention of petitioner that in considering the issue as to whether or not the portion of the time spent by the miners in traveling to and from their usual places of work and while not engaged in physical work or service constituted a part of the "workweek," evidence relating to the incidental perils and discomforts of underground mining was not relevant. Petitioners objected to this line of evidence when it was first presented by respondents on the cross-examination of Witness Ball, renewed the objection when such evidence was first affirmatively offered by respondents, and upon the objection being overruled, were allowed a continuing objection and exception to all such testimony.—(R. 2393-4).

The Congress did not intend by the enactment of the Act to eliminate, ameliorate, or regulate conditions of employment, and it legislated only in reference to minimum wages and maximum hours.—(p. 45, 55-59, infra).

Aside from the discomforts and perils that are incidental to all underground mining operations, the evidence discloses that the conditions in the mine of this petitioner were, in safety and comfort, equal to, if not superior to those customarily existing in other mining operations.

The District Judge in his opinion states:

> "These conditions (previously cited by the Court as a reason for his conclusion that all time spent underground was worktime) are recited not for the purpose of censure of the plaintiff's manner of maintenance of their mines for these conditions may well be normal conditions in iron ore mines and practically inevitable."—(R. 502).

If it be assumed, however, that such evidence is material, the finding of facts as made by the District Court and

relied upon by the Circuit Court of Appeals is, in substantial and determinative matters, contrary to the undisputed evidence, and the decision was reached by applying to all the petitioners and their employees much evidence which applied to only one or more of the petitioners, or to only some of their employees. In many instances the findings are predicated upon evidence which did not depict the average or usual conditions, but exceptional, casual, and the worst conditions in one particular mine or in one particular portion of one particular mine, and not existing in and representative of all mines.

Support for the above assertion is found in the following typical illustrations:

1. The undisputed evidence shows the existence of the traditional "face to face" practice in the mines of petitioners and elsewhere in the United States, notwithstanding the District Court's finding to the contrary. (pp. 10-12, supra); that no perils or discomforts existed in the Spaulding Mine of the Republic Company (R. 1908-12); that the practice of depositing "identification checks" at the "portal of the mine" (R. 4942) never prevailed in the Sloss Mines or at the Spaulding Mine of Republic (R. 1513, 786-7, 1908-12) and prevailed in the other mines solely for the purpose of safety and furnishing identification of those underground; that the "hazards of hitting their skulls against the low tunnel ceiling" (R. 4940) did not exist at all in the Spaulding Mine of Republic and existed in the other mines only when the workers became careless of their own safety, and had resulted in a long period of time in a minimum of minor injuries only (R. 972, 2645-6, 2788-92); that the cars used by the Tennessee Company for transporting miners operated on tracks in electrically lighted slopes having concrete roofs for a portion of the way from the surface to the underground loading stations (R. 978, 3750-D).

2. A composite finding as to all the mines is made that "the men frequently were given instructions as to when and how they should perform their respective duties before the skips left the portal of the mine and at all times during the descent they were subject to company rule and under company control."—(R. 4940-1).

This statement has no application in the case of the Spaulding Mine of Republic. In the other mines where mechanical transportation was used, the evidence is undisputed that the men in going to and from their working places were not accompanied by their supervisors or foremen and received no orders en route of any kind in reference to the performance of their duties.—(R. 1087, 1159, 1265). The only rules or control that the miners were subject to while on the skips were those relating to safety and having no connection with the details of the performance of their work.—(R. 1037-39). The undisputed evidence shows that the instructions referred to were given only occasionally and then only to a few of the employees, and that the great majority of the employees never received any instructions of any kind at the surface. These incidents are well defined by the original decision of the Court of Appeals in its opinion as follows:

> "We think that these pursuits should not be computed as work time since they fall within the category of duties incident to qualifying the employee to perform his work rather than within the scope of his actual employment."—(R. 4942).

3. It is undisputed that the composite findings of the carrying of tools, the giving of instructions, or the exercise of any acts of control were not supported by the testimony because these acts were infrequent, casual and sporadic, for the convenience of the miners and to their own advantage in saving time and effort, and in the case of all of the serv-

ice, and in the case of most of the productive, employees, were practically non-existent.—(R. 3105-6, 2663, 2694, 2746, 1271, 2519, 2743, 2731-2, 1087, 1159, 1265, 1037-39).

It is undisputed that in the mines of the Tennessee Company means were provided for getting all tools and supplies to the working places during the regular eight-hour shift.—(R. 2519-21, 2855-6, 3116, 3121, 3151).

Occasionally a miner might pick up a few wedges as he passed the piles of material or stick a piece of drill steel down his pants leg (R. 953), but it is undisputed that the practice was as above stated for the Company to transport the tools to the working places.

The District Court found:

> "Plaintiffs' employees occasionally obtain and return tools and frequently obtain carbide (at T. C. I. and Sloss) on the surface before entering the mine. At Republic, employees pick up a battery light, rented to them by the company, and turn the battery light in when they emerge from the mine at the end of a shift.—(R. 561).

9. *The history of Collective Bargaining of the Tennessee Company with the CIO.*

On October 19, 1933, the three local unions affiliated with the International Union of Mine, Mill & Smelter Workers, herein referred to as the Smelters' Union, at a conference with the officers of the Tennessee Company, presented six demands. Three of them were as follows:

> "4. Suggestion that men enter the mines on their own time and come out on Company time;
>
> "5. Suggestion for an 8-hour day and 40-hour week and
>
> "6. Suggestion that rates of pay be increased accordingly."—(R. 3592).

The company answered the demands as follow:

"The three suggestions are considered as one since they can be answered as such. The code adopted for coal mining is being followed very closely by this Company in connection with its ore mining operations and that code provides for 8 hours of work at the usual working place, exclusive of the lunch period, for a 40-hour week and for certain wage scales.

"While we do not propose the adoption of identical wage scales at the ore mines as those of coal mines, proper differentials are being maintained and adjustments have been made to secure a fair wage to each employee."—(R. 3593).

Attention has been called above to the definition of working time in the bituminous coal industry.

On *April 13, 1934*, representatives of the same union, including the respondents' witnesses, Anderson and McDaniel, presented twenty-two demands to the Company, the eighth demand reading as follows:

"In view of the fact that the Company can force the men to enter and leave the mines at any time stated by the Company, we ask the right to enter on our own time and leave on the Company's time."—(R. 3595).

The union then claimed to represent ninety per cent of the employees.—(R. 3594). It was strong enough to close down the mines from May 4th to July 2, 1934.—(R. 869-74, 884).

Operations were resumed on the "face to face" basis, excluding all travel time as the result of mediation, the agreement reached being evidenced by an exchange of letters between the Company and the Honorable Frances Perkins, Secretary of Labor, and Commissioners Dewey and Richardson.—(T. C. I. Ex. 8, R. 3604-18).

It is undisputed that the agreement reached excluded travel time, the demand for one-half travel time not having

been brought up during the negotiations.—(R. 876-7).

The agreement then reached was due to expire on June 24, 1935. On *June 13, 1935*, the representatives of the same locals met the General Superintendent in conference and presented a contract for the ensuing year containing seventeen sections. Section 9 read:

> "9. It is agreed that the employees shall enter the mines on their own time and come out on the Company's time."—(R. 3623).

The Company suggested that the existing agreement outlined in the Perkins' letter be continued for another year and that was agreed to.—(R. 88).

It is undisputed that the three foregoing demands for one-half of travel time were the only demands ever presented up to that time by any union employee or representative of employees, for any travel time in whole or in part, and that those demands were not seriously made since they were never referred to in any of the subsequent discussions.—(R. 882).

On *May 26, 1936*, the same Union presented the Company a proposed contract to terminate in 1937 which contained the following provision:

> "An eight hour day and five day week (40 hours per week) shall prevail, exclusive of the thirty minute lunch period, with option to run through without suspension if agreed to between the Company and the Mine Committee.
>
> "The eight hour day means eight hours in or about the mines, at the usual places for all classes of work, (other than those excepted from this Agreement), exclusive of the lunch period, whether they be paid by tonnage, except in case of accident, which temporarily necessitates longer hours for those employees required on account thereof, and also except those whose daily work

includes the handling of man-trips and those who are required to remain on duty while men are entering and leaving the mines."—(R. 3632).

It also contained the following:

"When an employee has no work at the face and is given other labor he shall be paid at the scale for such labor."—(R. 3636).

The Company had proposed an incentive plan, which the Smelters' Union refused to accept with the result that the mines were again closed by a strike from May 31, 1936, to August 19, 1936.

The Union had proposed among other things that the men have "no time off for lunch."

In the discussions which followed, the following was said, as shown by the minutes:

"Mr. Ball: No drag scrape or section crew except during emergency be permitted to start work before usual working time and must cease work at the regular quitting time.

"Our studies show that the men do not do that now.

When we check men in the mines we expect them to give a full eight hours work. The next paragraph states:

"Days work to consist of eight hours, 6:30 a. m., to 2:30 p. m., and 6:30 p. m., to 2:30 a. m., with no time off for lunch.

"Our answer to that is No. Our men go in the mines about 6:05 a. m., and they get to their working places about 6:45 a. m. Lunch is from 11:45 to 12:15. However, if the men want their lunch at some other time that is O.K. Quitting time is 3:15. That is eight hours face to face. Men that are working all day need their lunch period. They get up early and to keep in the best physi-

cal condition these hours should remain as they are. This also applied to the service men. Are there any comments?

"Mr. Horn: That is clear."—(R. 3673-4).

The incentive plan proposed by the Company contained the following definition:

"A fair day's work: This is the daily production of an average section crew working at the average rate of skilled miners with the average allowance for personal necessities, fatigue, and general mining delays and conditions."—(R. 3966).

The only suggestion on the part of the Union was that there be inserted after the words "an average section crew working" the words "in an average heading."—(R. 3648).

On *August 19, 1936,* the men returned to work under the Governor's Agreement (T. C. I. Ex. 13, R. 3687), under the terms of which the incentive plan was to be given a four months' trial, and after that period the men continued to work.

On *October 6, 1938,* before the Act took effect, the agreement of that date was executed as stated.—(p. 4, supra).

By its terms the contract was to remain in effect until changed or terminated by either party on ten days' notice. It remained in full force and effect until May 5, 1941, when, in compliance with the opinion of the Administrator, another agreement was made as stated.—(p. 5, supra).

No demands for travel time, except the three casual demands above referred to, were made by any employee, representative of employees, or union prior to October 5, 1940, when, following a press release of the Wage and Hour Division, which incorrectly set out the facts in the

case of the Cornucopia Gold Mines (R. 1066, 1068), the CIO Locals for the first time raised the question of compensation and demanded payment for travel time.—(T. C. I. Ex. 21, R. 3747-9).

The CIO Locals made similar demands upon the other petitioners and the Woodward Iron Company.

The Administrator subsequently by implication, corrected the prejudical and incorrect statement contained in his release in relation to the *Cornucopia Gold Mines Case* by stating that the decree of the District Court in the Cornucopia Case was a consent decree predicated upon the fact that the respondent therein, previous to the enactment of the Act, had, with the agreement of its employees, computed and paid the wages of its gold mine employees on the "portal to portal" basis, and subsequent thereto, and in evasion of the Act, not only changed it to the "face to face" basis, but adopted an arbitrary and incorrect length of time as covering their travel time.

VII

ERRORS OF THE CIRCUIT COURT OF APPEALS

1. The Circuit Court of Appeals erred in holding that the question whether travel time should be included in the computation of working time was a question of fact.

2. The Circuit Court of Appeals erred in sustaining the findings of the District Court on the ground that they were not clearly erroneous.

3. The Circuit Court of Appeals erred in sustaining the finding of the District Court that there was no custom not to include travel time in the computation of working time, though conceding arguendo "that for twenty-five years prior to 1938 iron-ore miners had not been compen-

sated for travel-time, and that even after 1938 the parties to this suit had entered into contracts whereby it was agreed that no wages should be paid for travel-time."

4. The Circuit Court of Appeals erred in holding that it was the intention of the Congress in passing the Fair Labor Standards Act to regulate the environment and physical conditions of work and that travel time was a part of work time because of its discomforts and hazards.

5. The Circuit Court of Appeals erred in affirming the decision of the District Court that travel time was to be computed in determining working time.

6. The Circuit Court of Appeals erred in setting aside agreements made through the process of collective bargaining on the ground that their "evidentiary value" was to be determined by a jury or other fact finding tribunal.

7. The Circuit Court of Appeals erred in its suggestion that the agreements set aside may not have been voluntary, because of the lack of bargaining equality.

8. The Circuit Court of Appeals erred in disregarding the exclusion by the District Court of relevant evidence.

VIII

SUMMARY OF ARGUMENT

1. *When the Fair Labor Standards Act was passed immemorial custom and agreements arrived at by the process of collective bargaining had established the "face to face" method as the standard and measure for computing working time in the iron ore industry.*

Both the custom and the agreements were established by undisputed evidence.—(pp. 4-25, supra).

The Circuit Court of Appeals conceded both. It disregarded the custom on the erroneous view that the Act was intended "to eliminate labor conditions detrimental to the general welfare of the workers." It disregarded the agreements on the ground that they were not voluntary, although arrived at by the duly authorized bargaining agents, in fact, by the top men not only in the Locals but in the International organization as well.—(p. 4, 18, supra).

If contracts so arrived at are to be thus lightly disregarded, one of the paramount purposes of the Congress to insure and safeguard collective bargaining will be frustrated.

2. *In the absence of anything in the Act to the contrary, it was competent for the parties immediately concerned to agree, in accordance with immemorial custom, that "working time" or the "work week" should include only productive time.*

The Circuit Court of Appeals thought the matter doubtful and upheld the District Court only under the rule that findings must be upheld unless "clearly erroneous."

But the question was not one of fact to be decided by a jury or other fact finding tribunal, one way in one case and the opposite way in another, resulting in unequal competitive conditions, which it was the purpose of the Act to prevent.

Moreover, under the decisions below the deeper mines will be at a great disadvantage with those whose headings are only five or six minutes walk from the portal, as in the case of Republic's Spaulding mine. The inevitable result will be that the newly opened mines will be rapidly exhausted and the older mines will be operated only when the demands exceed the ability of the shallow mines to supply them.

We adopt as our own the cogent reasons given in the Houck letter of July 9, 1940, to the Administrator for the submission that this is peculiarly a case "to afford the fullest possible scope to agreement among the individuals who are actually affected."

But the majority of the Circuit Court of Appeals thought that "the evidentiary value of agreements in relation to working time is for the jury or other fact finding tribunal."

3. *It was not the intention of the Congress to nullify long established customs and standards of measurement or to impair the obligation of contracts fairly arrived at through the process of collective bargaining.*

The Act is strictly a wage and hours law, establishing minimum wages and maximum hours. It did not attempt to define "work week."

The Congress must be deemed to have known of the long established custom and standard for measuring the work week in the bituminous and iron ore mining industries and the long administrative history set forth in the statement of the case.—(p. 4-49, supra).

If it had intended to abrogate long established customs and standards of measurement it would not have left the term "work week" wholly undefined. It could not have intended by implication to invalidate agreements arrived at through the process of collective bargaining at the very time it was attempting to strengthen and safeguard that process.

4. *Subsequent interpretations and administrative rulings of the Fair Labor Standards Act, and of acts of similar import, and the subsequent practical construc-*

tion of the Act by the parties, the industry, and the public generally, demonstrate that it was not the intention of the Congress to constitute travel time a part of the "work-week."

Petitioner's contention that the Congress must be deemed to have known of and to have legislated in the light of the traditional practice, contractual agreements, and the long administrative history set forth in the Statement of the Case (p. 4-49, supra) is strengthened by the undisputed fact that following the enactment of the Act the interested parties, including the beneficiaries under the terms of the Act and its Administrator, and all others, construed Section 7 (a) as authorizing the continuance and not in any way prohibiting the computation and payment of wages on the traditional "face to face" basis.

5. *The grounds of the decision below are untenable and without the support of authority.*

The finding of the District Court, affirmed by the Circuit Court of Appeals, that there was no custom not to include travel time in work time was based on two plain *nonsequitors,* (a) that the men were employed on a tonnage or task as well as an hourly basis, and (b) that they were permitted to leave the headings at irregular intervals before the "shooting" and were paid for a full day though they actually worked less.

The holding of both the District Court and the Circuit Court of Appeals that the purpose of the Act was to eliminate unhealthful conditions and uncomfortable and hazardous means of travel is obviously unsound. The Act was passed to promote the general welfare of the workers by enabling them to maintain minimum standards of living. It has nothing to do with health, safety or physical condi-

tions of labor, except, of course, as health is promoted by a proper standard of living.

It was a fundamental error to hold that the question was one of fact. There were no substantial disputes of fact. There were no conflicting inferences to be drawn from the facts. At most there might be differences of opinion. The Administrator apparently had one opinion as to the bituminous coal mines in 1940 and another as to iron ore mines in 1941.

It may be safely assumed that if this question were one of fact to be decided by the Administrator or other fact finding tribunal conditions approved as proper and harmless in one industry or plant might be disapproved in another industry or plant where the conditions may have been the same or better. Necessarily the field left for the operation of agreements as to what constitutes work time must be uniform in every case and in every part of the nation. That question cannot be left to the determination of each separate jury or fact finding tribunal. On the same evidence one jury might return one verdict and another an opposite verdict, and neither could be set aside "if different reasonable inferences may be fairly drawn therefrom." Each varying decision tends to increase "unfair competition in commerce." Such chaos and confusion can be avoided only by holding that the validity and effect of such agreements are matters of law for the courts to decide. To hold that parties cannot agree that compensation shall not be paid for travel time, or that the effect of such an agreement is an evidentiary question for the jury, tends to defeat the purpose of the Act and to promote unfair competition because the amount of time necessarily spent in traveling to and from the working place varies widely not only in different mines, but as between the working places in the same mine. As said in the dissenting opinion, "There is nothing in the Act to outlaw agreements that travel time

in getting to and from the agreed place of work is not work time."

Treating the validity of agreements in relation to working time as a question of fact, with their evidentiary value to be determined by the jury, the Court has held that if the ordinary man might fairly have drawn the inference from the evidence that the employees ought to receive compensation for travel time, then such finding should not be set aside. If the validity of agreements as to working time is treated as a matter of law, the conclusion is diametrically opposite—the non-pay time must be clearly work time or the agreement is valid and effective.

To treat the validity of agreements in relation to working time as questions of fact to be determined by a jury leads to confusion which would inevitably arise from the possibility, or even probability, of contrary conclusions. To treat the validity of agreements in such relation as questions of law results in uniformity of conclusions, and insures stability of economic relationship and conditions.

The Act was intended to have application for a permanent period of time and on a national scale. To operate successfully for the future the parties must be free to contract as to any time that is not clearly work time. What is not clearly work must be left subject to the contract of the parties.

ARGUMENT

POINT I

WHEN THE FAIR LABOR STANDARDS ACT WAS PASSED, IMMEMORIAL CUSTOM AND AGREEMENTS ARRIVED AT BY THE PROCESS OF COLLECTIVE BARGAINING HAD ESTABLISHED THE "FACE TO FACE" METHOD AS THE STANDARD AND MEASURE FOR COMPUTING WORKING TIME IN THE IRON ORE INDUSTRY.

The District Court said there was no such custom, obviously for untenable reasons which will be considered under Point IV. The majority of the Circuit Court of Appeals admitted both the custom and the agreement, but also disregarded them on untenable grounds which will likewise be considered under Point IV. The point with which we are immediately concerned is that the fact is established beyong the possibility of cavil or doubt.

The petitioners also tendered evidence which showed beyond the possibility of doubt that the "face to face" method had prevailed in the bituminous mines as long as anyone could remember. The evidence was excluded although the petitioners' bituminous mines in Alabama are practically alongside of their iron ore mines.

This evidence was excluded although the admitted and offered evidence showed without dispute that petitioner operated within a few miles of each other, and as an integrated part of its manufacturing operations, coal and iron ore mines; that the operations of both classes of mines as to ingress and egress of workmen, methods of mining, distances of travel, incidental perils and discomforts, competition, wage structure and wage agreements, payment and

receipt of wages, etc., were substantially or identically the same except that the travel distances and incidental perils and discomforts were greater, and the history of wage agreements through collective bargaining was longer in the coal mines than in the iron ore mines, and, despite the admitted and undisputed evidence that substantially similar conditions to those described above had for years uniformly and traditionally existed in the iron ore and coal mines throughout the United States, and, also, despite the ruling of the Administrator on July 18, 1940, that the "traditional practice of computing work time on a 'face to face' basis in the bituminous coal mining industry would not be unreasonable," and despite the fact that all the administrative interpretations, arbitration awards and legislative and judicial declarations (p. 10-28, supra) had sanctioned or directed the "face to face" basis in all coal mines throughout the nation.

When the Congress enacted the Act it must be assumed to have had knowledge of these matters and to have legislated in the light thereof.

United States v. Irwin (April 6, 1942), 62 Sup. Ct. Rep. 899;

Interstate Commerce Commission v. Baltimore and Ohio Railroad Co., 145 U. S. 263;

Reiche v. Smythe (1872), 13 Wallace 162;

Mark v. United States, 161 U. S. 297;

United States v. Farrar, 281 U. S. 624;

Hahn v. United States, 107 U. S. 402;

Stairs v. Peaslee (1855), 18 Howard 521;

National Lead Company v. United States, 252 U. S. 140;

United States v. Isham, 17 Wallace 496-507;

The Congress did not specify in the Act that all time spent underground in coal mines or ore mines should be a part of the "work week," and it did not intend to provide

that such time should be work in the ore mines and not work in the coal mines; it did not intend to create the anomalous situation that fellow employees of the Tennessee Company, living in the same village, represented by the same Union, receiving their wages in the same manner at the same time and place, having the same general superintendence, working and traveling underground under the same general conditions, encountering substantially the same incidental perils and discomforts, should, if a coal miner, be not paid for travel time, but if an ore miner, be paid for travel time. The Congress did not intend to declare as valid the "face to face" provisions in the wage agreements with the United Mine Workers of America and void the exactly same provisions in the wage agreements with the International Union of Mine, Mill and Smelter Workers, both, at the time of the enactment of the Act, affiliated with the Congress of Industrial Organization.

It is respectfully submitted that the facts in reference to the bituminous coal mines, employing approximately 500,000 employees were not only relevant in ascertaining the intent of the Congress as to the iron ore mines employing 20,000 employees, but have a controlling effect in showing that the construction of the Circuit Court of Appeals of Section 7 of the Act does not represent or accord with the intention of the Congress.

If any possible doubt can arise against the assertion that it was the intention of the Congress not to legislate differently in reference to coal mines and iron ore mines, this doubt is dissolved by the application of the principle that when the language used is indefinite or ambiguous the practical interpretation by the parties themselves is entitled to great, if not controlling influence.

Chicago v. Sheldon, 9 Wallace 54.

The undisputed evidence shows that subsequent to the enactment of the Act, Section 7 (a) of the Act has been con-

strued by the industry, the parties beneficiary, the Administrator of the Act, the National War Labor Board, the Secretary of the Interior as Solid Fuels Administrator and agent of the Government in assuming control of the coal mines, and everyone else as authorizing the continuance of the traditional practice of computing and paying wages on the "face to face" basis and the making of agreements relating to travel time.

In the light of the foregoing it is clear beyond the peradventure of a doubt that the construction of the Circuit Court of Appeals to the contrary cannot be maintained.

The practices and customs in the bituminous coal mines have been the subject of administrative action so frequently that they are matters of common knowledge. The Congress certainly was aware and the Court will take judicial notice of the settlement of 1917, approved by Fuel Administrator Garfield, of the report of the Bituminous Coal Commission in 1920, approved by President Wilson, and of the Code of Fair Competition for the bituminous coal industry adopted under the NIRA and approved by President Roosevelt; indeed, the National Labor Relations Act and the Fair Labor Standards Act were passed to accomplish the purposes of NIRA, of which the Congress could not have been ignorant.—(p. 13-26, supra).

POINT II

IN THE ABSENCE OF ANYTHING IN THE ACT TO THE CONTRARY, IT WAS COMPETENT FOR THE PARTIES IMMEDIATELY CONCERNED TO AGREE, IN ACCORDANCE WITH IMMEMORIAL CUSTOM, THAT "WORKING TIME" OR THE "WORK WEEK" SHOULD INCLUDE ONLY PRODUCTIVE TIME.

The majority of the Circuit Court of Appeals thought the matter was doubtful, indeed so doubtful that they were able to sustain the decision of the District Court only by invoking the rule that findings not "clearly erroneous" should be sustained. They were at pains in denying the motion for a rehearing to say that they had not adopted a rigid definition of "working time," had not upheld the portal-to-portal theory as a matter of law; and had not denied the principle that in close cases it is well to afford the fullest scope to agreements among the individuals who are actually affected (137 Fed. (2d) 176, 183).

A matter so doubtful that it can only be resolved by invoking the rule against disturbing findings not "clearly erroneous" would seem to be close enough to be decided according to the concepts, customs and practices in the industry by those immediately concerned.

In *Walling v. Belo Corp.*, 316 U. S. 624, Mr. Justice Byrnes, speaking for a majority of the Court, said:

"The problem presented by this case is difficult—difficult because we are asked to provide a rigid definition of 'regular rate' when Congress has failed to provide one. Presumably, Congress refrained from attempting such a definition because the employment relationships to which the Act would apply were so various and unpredictable. And that which it was unwise for Congress to do, this Court should not do. When employer and employees have agreed upon an arrangement which has proven mutually satisfactory, we should not upset it and approve an inflexible and artificial interpretation of the Act which finds no support in its text and which as a practical matter eliminates the possibility of steady income to employees with irregular hours. Where the

question is as close as this one, it is well to follow the Congressional lead and to afford the fullest scope to agreements among the individuals who are actually affected."—(pp. 634-5).

That language is exactly apposite to the instant case.

There is no suggestion here of any effort to circumvent or defeat the statute. A good faith agreement was made, participated in on behalf of the Union by their top officials and legal advisers even of the International Union. That agreement defined "work day" in the exact terms of a definition proposed by the Union itself two years earlier. Under that agreement employees worked until May, 1941, nearly three years after the passage of the Act, and they received and receipted for their payments in full, knowing that travel time had not been included in the computation of working time. Under the decisions below they are now to receive a windfall of nearly three years back pay with time and a half for overtime.

The cogent reasons set forth in the Houck letter for treating the matter as an appropriate subject for contract apply with full force to the instant case and, whether that letter was admissible as evidence or not, we adopt it as a part of our argument and annex it as an appendix to this brief.

It was competent for the parties immediately concerned to agree that all, any part or no part of travel time, even from the home to the place of work at the face, should be included in computing work time. The question cannot be made to turn on mere incidents varying in different cases, such as the occasional carrying of a tool from the portal or loading station or even the discomforts and hazards of travel.

The opinions of Chairman Davis and Mr. Morse in the Matter of Operators Negotiating Committee and United

Mine Workers of America, delivered June 19, 1943 (Case No. 111-1284), show that the subject is peculiarly one for the agreement of the parties (p. 21-25, supra and appendix).

Surely the fullest scope should be given for the settlement by the parties themselves of questions of such complexity and difficulty.

If the incubus of the judicial precedent of this decision is removed, and the parties having the most interest, the greatest knowledge, and the longest experience in underground mining are permitted to negotiate and reach an agreement on the question of travel time compensation, the chaos which, as predicted in the Houck letter, in the dissenting opinion in this case, and in the opinions of the National War Labor Board, has occurred, would not have occurred.

POINT III

IT WAS NOT THE INTENTION OF THE CONGRESS TO NULLIFY LONG ESTABLISHED CUSTOMS AND STANDARDS OF MEASUREMENT OR TO IMPAIR THE OBLIGATION OF CONTRACTS FAIRLY ARRIVED AT THROUGH THE PROCESS OF COLLECTIVE BARGAINING.

The Act is purely and simply a wage and hours act. There is no question here but that the wages paid by the petitioner were far above the prescribed minimum. The sole question is whether travel time is to be included in work time. The very fact that the Congress attempted no definition of "work time" or "workweek" shows that it did not intend to upset long established customs and standards of measurement and definition, and that it did intend to leave

the matter to the parties immediately concerned. Of that there is affirmative evidence in the report of the Senate Committee of July 6, 1937, (p. 26, supra), and in what was said on July 29, 1937 in debate in the Senate (p. 28, supra).

In construing the Act in *United States v. Darby*, 312 U. S. 100, this Court said:

"Its purpose, as we judicially know from the declaration of policy in Section 2 (a) of the Act, and the reports of Congressional committees proposing the legislation, S. Rept. No. 884, 75th Cong. 1st Sess.; H. Rept. No. 1452, 75th Cong. 1st Sess.; H. Rept. No. 2182, 75th Cong. 3d Sess.; Conference Report, H. Rept. No. 2738, 75th Cong. 3d Sess., is to exclude from interstate commerce goods produced for the commerce and to prevent their production for interstate commerce, under conditions detrimental to the maintenance of the minimum standard of living necessary for health and general well-being; and to prevent the use of interstate commerce as the means of competition in the distribution of goods so produced * * *. (pp. 109-110).

* * * *

"The motive and purpose of the present regulations are plainly to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows. (p. 115).

* * * *

"As we have said the evils aimed at by the Act are the spread of substandard labor conditions through the use of the facilities of interstate commerce for competition by the goods so produced with those produced under the

prescribed or better labor conditions; and the consequent dislocation of the commerce itself caused by the impairment or destruction of local businesses by competition made effective through interstate commerce. (p. 122).

* * * *

"Both provisions are minimum wage requirements compelling the payment of a minimum standard wage with a prescribed increased wage for overtime of 'not less than one and one-half times the regular rate' at which the worker is employed." (p. 125).

It is not a health law, except of course as proper standards of living promote health. It does not say a thing about the physical conditions of labor. It was passed, of course, to promote the general welfare of the workers by assuring them a minimum standard of living, and the lower courts thought that it could be sustained because the improvement of working conditions promoted general welfare; but that was not the matter on which the Congress was legislating and the introduction of the "portal to portal" method of computing the work week will tend to nullify the constitutional basis of the Act by creating unequal competitive conditions.

The matter is peculiarly one for the parties themselves to work out through the process of collective bargaining. In 1938 the definition of the bituminous coal industry was adopted exactly as the Union itself had proposed two years earlier. The Union had included a demand for one-half of travel time in the demands presented by them in 1933, 1934 and 1935, obviously for bargaining purposes since the matter was never pressed.

The employees have received substantial increases in pay on the definition of "work day" proposed by their own Union. Presumably all relevant factors were taken into account in fixing the rates of compensation; at any rate

they were fixed on the basis that the work week did not include travel time.

It is inconceivable that the Congress could have intended to nullify contracts fairly arrived at by the process of collective bargaining at the very time when they were strengthening and safe-guarding that process in every way, and we know from the debates as well as from the text of the Act that they had no such intention.

The Supreme Court of California decided that an Act of that state passed in 1909 which prohibited the employment of workers in underground mines more than eight hours out of twenty-four (Stat. 1909, p. 279, c. 181, approved March 10, 1909) was not violated by excluding travel time from work time, saying:

> "Giving to the words of the act their ordinary and reasonable meaning, the limitation of time is to be construed as referring to the time when men are actually engaged in work, not when they are going to and from their work. There is nothing in the language of the act which would justify a more restricted interpretation." —(*Ex Parte Martin,* 106 Pac. 238-9).

Ten other states passed substantially similar acts after the above decision and, as far as our research discloses, that decision has never been questioned with the exception of the decision in the case of *Butte Miners Union No. 1 v. Anaconda Copper Mining Company.*—(p. 16, supra). With the knowledge of those statutes and of that decision, the Congress used, without defining, the term "workweek" which has a much more restricted meaning than "employ" or "employment."

Three states, Arizona, Nevada and Utah, in plain terms limited the time that employees could work in underground mines to eight hours. The Congress did not see fit to follow that example.

The Legislature of Alaska in 1917 expressly adopted the "face to face" method of computing work time in underground mines. The Congress did not see fit to follow that example.

In short, without defining it, the Congress used a term which might be made to fit the varying concepts, customs, traditions and standards of different industries when it could very easily have provided that travel time should be included in the computation of a "workweek" if it had so intended.

It centered its attention on minimum wages and maximum hours of work, with the obvious intention that the Act should be applied in accordance with the traditions, customs and standards of different industries.

In Walling v. Belo Comporation, 316 U. S. 624, this Court sustained an agreement of the parties defining "regular rate," though it was charged and some of the members of the Court thought that it was an evasion of the statute.

In Williams v. Jacksonville Terminal Co., 315 U. S. 386, this Court sustained an agreement that "tips" should constitute a part of "wages."

There is no suggestion in the instant case of any attempt to evade or circumvent the statute. A fair agreement, made in good faith, establishing the method for computing "working time" or the "work-week" in accordance with the unbroken custom of the industry was equally within the scope of agreements which the Congress left the parties free to make, since it attempted no definition of those terms and prescribed no method of computation, though presumed to know of the prevailing method in the industry.

POINT IV

THE PRINCIPAL PURPOSE OF THE FAIR LABOR STANDARDS ACT AND ITS CONSTITUTIONAL BASE WAS THE PREVENTION OF UNFAIR COMPETITION IN COMMERCE.

Not only did the Circuit Court of Appeals err in holding that it was the purpose of the Fair Labor Standards Act to "eliminate labor conditions detrimental to the general welfare of workers" and "these (the incidental perils and discomforts) and similar abuses," but it overlooked or ignored that the purpose and constitutional base of the Act was to prevent unfair competition in commerce.

United States v. F. W. Darby Lumber Company (February 23, 1941), 61 Sup. Ct. Rep. 451-63;

Fleming v. Belo Corporation (5th C. C. A., affirmed by this Court June 3, 1942, 66 Sup. Ct. Rep. 1223), 121 Fed. Rep. (2d) 207.

The inevitable result of the decision is the restraint of interstate commerce instead of its protection, and the causing, instead of the prevention, of "unfair compensation in commerce." The distances from the portal to the work places vary in all underground iron ore and coal mines—some are shallow, some are deep. Changing to the "portal to portal" basis gives to competitors having shallow mines an unfair advantage over competitors having deep mines, raises the relative production costs in the mines with longer travel time, and, unless overtime compensation is paid, reduces the relative production of the mines having longer travel time. A striking illustration of this is found in comparing the Spaulding Mine of Republic where the travel time is approximately fifteen minutes, with other mines

where, in some instances, it exceeds one and one-half hours, This is typical of underground ore mining operations in Alabama and throughout the United States. The same inequalities, in a marked degree, exist as between all mines and within each mine.

POINT V

THE GROUNDS OF THE DECISIONS BELOW ARE UNTENABLE AND WITHOUT THE SUPPORT OF AUTHORITY.

(1) The District Court found that there was no custom in iron ore mining not to include travel time in the computation of work time, which the Circuit Court of Appeals affirmed as not clearly against the evidence.

The reasons for the decision of the District Court were:

(a) that men were employed on a tonnage or task basis.

But the definition in the contract tendered by the Union itself in 1936 included the phrase "whether they be paid by tonnage" (p. 6, supra); and the written agreement actually executed on October 6, 1938, included the phrase "whether they be paid by the day or be paid on the tonnage basis.—(p. 4, supra). Of course there is no difficulty in computing the extra time no matter on what basis the employees are paid.

(b) that employees were actually paid for eight hours work though in fact they may actually have worked less than eight hours.

All of the men except those who actually lighted the fuses were, for their own safety, required to leave the head-

ings before the "shooting" and in practice they did leave at irregular intervals before and went to the loading stations where benches were provided for them to sit. If a crew happened to be short, the mine foremen assigned a substitute at the loading stations who was thus frequently late on the first day in arriving at the face. In such instances the men were all credited with a full eight hours work. That reasonable, practicable and fair method of treating the employees certainly does not show that it was not the custom or the agreement to exclude travel time from work time in the computation of work time.

The majority of the Circuit Court of Appeals disposed of the admitted custom on the ground that the purpose of the Act "was to eliminate labor conditions detrimental to the general welfare of the workers," and the respondents greatly magnify the supposed discomforts and hazards of underground travel and the alleged poor ventilation of the mines. But the Act does not say a single word on the subject of those conditions.

Alabama has passed a statute on the subject in relation to the bituminous coal mines.—(Code of Alabama, 1940, Title 26, Chap. 2, Sections 30-166).

The Congress itself has passed an Act on the subject.—Federal Coal Inspection Act, May 7, 1941, 55 Stat. 177).

It is common knowledge that the hazards in underground coal mining are greater than in the iron ore mines as the latter are not gaseous. This Court said that minimum wages and maximum hours were prescribed to promote the "general welfare" of the workers and the courts below evidently thought that anything that promoted general welfare was within the Act, though it was absolutely silent on anything but minimum wages and maximum hours.

(2) The majority of the Circuit Court of Appeals set aside the agreement on the ground that it was not voluntary. They said:

"The record discloses that this agreement was not a simple statement of admitted fact, but was a compromise adjustment of real differences reached by way of negotiation and concession, and that the workers though vainly, insisted upon their right to be paid for travel time."—(135 F. (2d), 320, 322-323).

The very purpose of collective bargaining is to adjust differences by negotiations and concession. There is no suggestion in this case that there was any over-reaching or coercion. On the contrary, the undisputed evidence shows that the wage agreements were reached after extensive negotiations and the execution of the agreements were participated in and closed by the top officials of the Union, including counsel.—(p. 4, 6, supra). The definition of "work day" was proposed by the Unions themselves exactly as they had proposed it two years before. The Congress certainly did not intend that agreements fairly arrived at by collective bargaining should be set aside on such fanciful grounds.

(3) It was a fundamental error to hold that the question was one of fact.

There was no substantial dispute of fact. There were no conflicting inferences to be drawn from the facts. At most there might be a difference of opinion. The Administrator had one opinion as to the bituminous coal mines in 1940 and another as to the iron ore mines in 1941.

Such a question was peculiarly one to be settled by the parties concerned. The Congress certainly did not intend that a jury or other fact finding tribunal should be permitted to decide the question in one way in one case and a different way in another, with the resulting confusion and impairment of the very constitutional basis of the Act, nor did it intend that the construction of the Act or the "evidentiary value" of contracts fairly arrived at through

the process of collective bargaining should be for a jury or other fact finding tribunal.

We desire especially to call the Court's attention to the very cogent dissenting opinion of Judge Sibley.—[135 F. (2d) 323-325].

4. The decisions below have no support in the authorities.

Compensation cases for personal injuries or death of an employee by accident "arising out of or in the course of his employment," like *Bountiful Brick Co. v. Giles*, 266 U. S. 154, and cases under the Federal Hours of Service Act limiting the time that railroad employees may be required to "remain on duty," considered by this Court in *Missouri, K. and T. Ry. Co. v. United States*, 231 U. S. 112, are not at all analogous.

Sunshine Mining Co. v. Carver, 41 F. Supp. 60, and *Butte Miners Union No. 1 v. Anaconda Copper Mining Co.*, 118 Pac. (2d) 148, involved different mining operations in Idaho and Montana, respectively, having a different history from those involved in the instant case. Neither court held in those cases that the question was one of fact.

In the *Sunshine Mining Company Case* the mine involved was a non-ferrous one. It did not appear that the practice by traditional custom and contract had been for many years to pay wages on the "face to face" basis. The District Judge intimates that his decision would have been different if previous custom and existing agreements had been shown, and clearly indicated the inherent right of bargaining by the use of the following words:

> "Before and after the adoption of the Wage and Hour law the lunch hour periods have been set aside as non-working time and that was recognized by the Union who did not consider the lunch period as time worked, as ap-

pears by the proposed contracts they submitted to the plaintiff. They knew before entering the mine that they were granted a lunch period of a certain time in which to eat their lunch and rest while in the mine, and when in doing so they are relieved of all duties. Under such circumstances, in the absence of an agreement between the employer and employees that the lunch period should be work time, the conclusion is inevitable that one would not be actually working while he is eating his lunch or resting, for he is not at that time rendering any services."

In the case of *Butte Miners Union No. 1, supra,* the decision was predicated entirely upon the necessity, so the majority of the Court held, of following the Modified Portal to Portal Opinion of the Administrator in order to prevent inconsistent and chaotic methods of administration in the federal and state fields.

None of the great iron ore and coal mining states have enacted statutes on the subject and in all it has been the uniform practice from time immemorial to compute working time on a "face to face" basis.—(p. 15 supra). If the Congress had intended to override such long established customs and to invalidate express agreements arrived at by collective bargaining, it would have said so in plain terms and would not, by deliberately refraining from any definition of "working time" or "workweek," have afforded the fullest possible scope to agreements among individuals who are actually affected.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Fifth Circuit should be reversed and a judgment rendered herein declaring that it was not the intention of the Congress, in the use of the word "workweek," as it appears in Section 7 of the Act, in its application to petitioner's employees to require "portal to portal" travel time to be included in the computation of the "workweek" prescribed by Section 7 of the Act.

NATHAN L. MILLER,

BORDEN BURR,

Attorneys for Petitioner,
Tennessee Coal, Iron and Railroad Company.

The undersigned, of counsel for Tennessee Coal, Iron & Railroad Company, petitioners, hereby certifies that a printed copy of this brief has this day been served upon Crampton Harris and J. Q. Smith, Birmingham, Alabama, of counsel for respondents, and upon Bessie Margolin, Assistant Solicitor, United States Department of Labor, and the Solicitor General of the United States, Washington, D. C., this the ..... day of December, 1943.

Borden Burr.

APPENDIX

LETTER FROM UNITED MINE WORKERS OF AMERICA AND COAL OPERATORS TO ADMINISTRATOR OF WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

1617 Pennsylvania Boulevard,
Philadelphia, Pa., July 9, 1940.

Col. Philip B. Fleming, Administrator,
Wage and Hour Division,
Department of Labor,
Washington, D. C.

Dear Mr. Administrator:

As a result of certain investigations which have been conducted by the Wage and Hour Division at bituminous coal mines in Pennsylvania, particularly at the Revloc shaft of the Monroe Coal Mining Company, and a conference that has been held by your Supervising Inspector, Mr. Caffey, at Pittsburgh, Pa., with a committee of the Western Pennsylvania Coal Operators' Association concerning the application of the Fair Labor Standards Act of the bituminous coal mining industry, certain questions have arisen that are disturbing to both employers and employees within the industry. These uncertainties have been continuing for some time and are causing much concern to the mine workers and the mine operators, especially with reference to "travel time."

Today, the Negotiating Committee of the Appalachian Wage Conference, namely: Messrs. J. D. A. Morrow, President of Pittsburgh Coal Company; L. T. Putnam of the

Raleigh Wyoming Mining Company, Beckley, W. Va.; L. C. Gunter of the Southern Appalachian Coal Operators Association, Knoxville, Tenn.; Charles O'Neill, President of United Eastern Coal Sales Corporation, New York City; C. E. Cowan, Vice-President of Monroe Coal Mining Coming; Frederick H. Knight, Counsel for Monroe Coal Mining Company; W. L. Robinson, President of the Youghiogheny & Ohio Coal Company and Chairman of the Appalachian Wage Conference on the one hand, and Mr. Earl E. Houck, Director of the Legal Department of the United Mine Workers of America, met with Mr. Dorsey, Regional Director, Philadelphia, Pa., and Mr. Gallagher, Regional Counsel, Philadelphia, Pa., at which time these questions were discussed at length, particularly the application of the Act as to the questions of hours of work in the bituminous coal industry.

The mine workers and the mine operators present presented their views to representatives of the Wage and Hour Division as to the provisions of the Appalachian Wage Agreement covering maximum hours and working time. We have filed with the Division copy of the Appalachian Wage Agreement, and the entire provision as to maximum hours and working time is included therein. The pertinent language, however, is "Seven hours of labor shall constitute a day's work. The seven-hour day means seven hours' work in the mines at the usual working places for all classes of labor, exclusive of the lunch period, whether they be paid by the day or be paid by the tonnage basis * * *." The Appalachian Wage Agreement is the basic agreement for the bituminous mines in the States of Pennsylvania, Ohio, West Virginia, Virginia, Eastern Kentucky, Southeastern Tennessee and Marylahd. In this territory there are several thousand rail-shipping mines employing from 300,000 to 325,000 men, and some twenty-three operating districts. Each of the districts work out a local wage agreement cov-

ering its own territory, subject, however to the provisions that it must include within it all of the provisions of the Appalachian Agreement.

The mines in the Appalachian region produce 70 per cent of the total bituminous coal produced in the United States annually. Also, the Appalachian Agreement is used by the United Mine Workers of America as a basic agreement upon which the district agreements of the remaining 30 per cent of the country is predicated.

The United Mine Workers of America and coal operators of the United States have been negotiating wage agreements for a period of fifty years. The Appalachian Agreement, covering as it does a great number of men and mines, has been worked out over that period of time and covers within its general provisions myriad wage rates, conditions of work, and hours of employment. This agreement, with its twenty-three supplemental agreements, constitutes a whole document. In these conferences, of course, hours of work has been one of the principal matters of consideration during this period of time. Hours of work with wage rates constitute the heart of any such agreement. In this basic industry we have provided for seven-hour days, five-day weeks, thirty-five hours per week, with high rates of pay. The basic inside a day rate in the North is $.857 per hour, and in the South it is $.80 per hour. The underground workers are paid on this basis, with maximum rates for mobile loading machine operators, approximate $1.09 per hour. In addition, the government provides, "work by mine workers paid by hour or day in excess of seven hours in one day, or thirty-five hours in any one week, shall be paid for at the rate of time and one-half * * *." It is our opinion that these substantive provisions of the agreement are among the highest standards of labor provided in any industry in the United States, both as to hours of working time and as to wages paid. There is full and

complete understanding in the industry between employer and employees as to the application of these provisions. This method of measuring the working time at the place of work has been the standard provision in the basic wage agreements for almost fifty years and is the result of collective bargaining in its complete sense.

There are many reasons why the provision as to working time has been set out as provided by this agreement. The impracticability of measuring time by any other method is inherent in the very nature of mining coal. Coal mines are sometimes very extensive. When they are first opened up, the working places, are, of course, closer by and near to the opening of the mine. In such cases there is no problem of either transportation of the men to the working places or time consumed in reaching them; but as mines grow older, the working places move farther, and farther away from the portal or opening of the mine, and as such conditions develop, it becomes necessary for provision to be made for transportation of the men over long distances to their working place. This is usually provided by what is known in the industry as "man trips." These trips are scheduled to leave the outside or opening of the mine at a certain hour, so that all the employees will reach their working places by the hour at which work regularly begins at the working places throughout the mine, and these trips are also scheduled to leave the inside of the mine when the day's work is done, at the conclusion of the seven-hour period of work at the working places.

Among other provisions of the agreement, there is provided a time for starting the day's work and a lunch period, as well as a time for expiration of the work day. There is some variation in this, depending upon local conditions as to the starting and quitting time at the various collieries. The agreement provides for certain tolerance. In any event,

the starting and quitting time are no more than seven hours apart, exclusive of the lunch period.

In the many conferences that have been held over this period of fifty years, naturally all manner of suggestions and proposals for amplification or amendment of the agreement has been made both by the mine workers and the operators.

The uniform high rates of pay that have always been included in the wage agreement of the mining industry contemplate the employee's working day beginning when he arrives at his usual working place. Hence, travel time was never considered as a part of the agreement or obligation of the employer to pay for in this industry, nor as hours worked by the employees, and this has been the case since the eight-hour day was established in the industry—April 1, 1898.

It is urged that any ruling requiring such a change in the custom, tradition and contract provision so as to change the work day from "seven hours" work in the mines at the usual working places" to any new standard for the measurement of time worked, and to the adjustment of wage rates made necessary thereby, would create so much confusion in the bituminous industry as to result in complete chaos, and would probably result in a complete stoppage of work at practically all of the coal mines in the United States. Such a ruling, moreover, would establish such diversity of time actually spent at productive work as between different bituminous coal mines and within each mine that there would be no basis on which any general wage scales could be predicated, collective bargaining would therefore be rendered impossible throughout this industry, and the very purpose of the Fair Labor Standards Act would be defeated. In such an event, it would make necessary the reassembling of the Appalachian Joint Wage Conference and

it would be faced with an issue that would be almost impossible of solution by agreement, resulting in an industrial conflict that would paralyze the nation. This would be a most unhappy result to flow from an act that was passed by the Congress to aid workers in industries that had unreasonably long hours and unreasonably low rates of pay, as contrasted with the short hours and the high rates of pay in the bituminous coal mines. The great amount of money involved in the case of extra payment by the operators or the great changes that would be required in the rates of pay to the miners, should any change in the present contract be necessary by reason of a new standard for the measurement of time worked, is so serious that a negotiated adjustment would seem to be impossible.

For the foregoing reasons, we believe that your Division should accept the standards of wages and hours of work, and the definition of working time, as set forth in the Appalachian agreement (which embodies the customs and traditions of the bituminous mining industry), as complying both with the provisions of the Fair Labor Standards Act and of Interpretative Bulletin No. 13, to the effect that "reasonable standards agreed upon between the employer and the employee will be accepted for the purpose of the Act."

We therefore respectfully request that your Division issue a supplement to Interpretative Bulletin No. 13, stating that the standards of wages and hours of work, and definition of working time, set forth in the Appalachian Agreement, entered into on May 12, 1939, between twenty-three district associations of bituminous coal operators comprising the Appalachian coal producing area and the International Union, United Mine Workers of America, and the

several district agreements based thereon, conform to and satisfy the requirements of the Wage and Hour Act.

Respectfully submitted,

For the United Mine Workers of America:

(S) EARL E. HOUCK,
Director of the Legal Department.

For the Operators:

(S) W. L. ROBINSON, Chairman,
(S) CHARLES O'NEILL,
(S) L. T. PUTNAM,
(S) L. C. GUNTER,
(S) J. D. A. MORROW,
Appalachian Joint Conference
Negotiating Committee.

(Plaintiff's Ex. No. 25, R. 1710-16).

OPINIONS OF CHAIRMAN DAVIS AND MEMBER MORSE OF NATIONAL WAR LABOR BOARD

—o—

NATIONAL WAR LABOR BOARD

Washington, D. C., June 17, 1943

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CASE NO. 111-1284

—o—

In the Matter of

OPERATORS NEGOTIATING COMMITTEE, APPALACHIAN JOINT CONFERENCE

and

OPERATORS NEGOTIATING COMMITTEE, SOUTHERN APPALACHIAN JOINT WAGE CONFERENCE

and

UNITED MINE WORKERS OF AMERICA

—o—

OPINION

The Operators Negotiating Committee of the Appalachian Joint Conference and the Operators Negotiating Committee of the Southern Appalachian Joint Wage Conference have reported to the Board that no agreement has been reached with the United Mine Workers of America on any of the issues which the National War Labor Board, in its directive order of May 25th, referred back to the parties for further negotiation.

The principal question so referred was whether the parties could agree upon a reasonable settlement of the claim advanced by the United Mine Workers that the under-

ground workers are lawfully entitled to additional compensation for travel time, under the provisions of the Fair Labor Standards Act.

Since the parties have failed to agree it becomes our duty, under the national no-strike policy and Executive Order No. 9017 of January 12, 1942, finally to determine this labor dispute.

We have directed the parties to execute new contracts containing all the basic provisions of the old Appalachian Agreements, with certain modifications which are specified in the Directive Order. These include a provision for an additional $30.00 of vacation pay as provided for in our directive order of May 25th, and provisions requiring the operators to pay for safety equipment and devices, including electric light and cap rentals, and for blacksmithing and to furnish necessary tools and equipment without charge. The order does not provide for the payment of any additional compensation for travel time or "portal to portal" pay.

PORTAL TO PORTAL ISSUE

The Board, in its discussions of this case, has considered the matter of additional compensation for travel time in two aspects, (1) the inequality that comes from basing the pay of all underground workers on the hours worked at their working places in the mines, when the individual workers spend different amounts of time getting from the portal of the mine to their working places and back from the working places to the portal, and (2) the legal claim advanced by the United Mine Workers for additional pay for travel time under the Fair Labor Standards Act.

(1) The inequality that results from basing the pay of all the miners on the same hours worked at their working places, regardless of the amount of time that the indi-

vidual worker has to spend in traveling, is an inequality that could be cured only by including in the pay of individual mine workers an additional compensation *according to the amount of time that they actually spent in traveling.* Plans which have that effect are now in use in the iron ore mines of the country and in coal mines in other countries.

In the bituminous mines involved in this dispute the parties have agreed throughout more than fifty years of collective bargaining that wages should be paid on the "face to face" basis; that is, on the basis of time spent at the working places. On July 18, 1940, the Administrator of the Wage and Hour Division of the Department of Labor, following representations made jointly to him by the Operators and the United Mine Workers, expressed the opinion that "the practice of computing working time on a 'face to face' basis in the bituminous mining industry would not be unreasonable" under the provisions of the Fair Labor Standards Act. The Appalachian Agreements of 1941 were entered into between the parties in the light of this ruling. They retained the old maximum hours and working time provisions in which compensation was based on the "face to face" principle. The Mine Workers chose at that time "face to face" rather than "portal to portal" pay for their own reasons which they had given to the Wage and Hour Administrator in the letter of July 18, 1940. They agreed to put up with the inequality that comes from the fact that individual mine workers have to spend different periods of time in travel.

When the negotiations for the new contract were initiated in March of this year the mine workers demanded, as they had a right to do, that the new contract should make provision for additional compensation for travel time. Their demand was that the operators should pay for travel time "to conform with the basis and legal requirement for the industry." On August 13, 1941 the United States District

Court in Alabama had decided that all time spent underground in iron ore mines was working time and should be included in the computation of the employees' work week under Section 7 of the Fair Labor Standards Act, and on March 16, 1943 this decision was affirmed by the Fifth Circuit Court of Appeals.

The inequality in the present "face to face" systems of mnpayment is measured by the actual time spent by the individual mine worker traveling to and from his working place in the mine. It cannot be removed by a general increase to all mine workers. After such an increase the inequality would remain just what it was before. Sam Smith who works seven hours at his working place in the mine and has to spend two hours a day getting in and out would still get the same wage as John Jones who works seven hours at his working place in the mine and has to spend only 20 minutes getting in and out.

We have, of course, during our consideration of this dispute, given careful thought to the possibility of working out an agreement which actually takes care of this inequality. We have been stopped by two obstacles either one of which would make impossible the necessary adjustment at this time.

In the first place neither party to the dispute has proposed to us any kind of a plan that would actually take care of this inequality. The only thing that has been suggested is a general wage increase equally applicable to all the mine workers. In our directive order of May 25th, after most careful deliberation, we held that no general wage increase for wage earners could be approved. In the comments accompanying that order we discussed the economic position of the bituminous mine workers and pointed out why we could not approve any general wage increase for them. At a later place in this opinion we have made further refer-

ence to this subject, for reasons which appear at that place.

In the second place, the whole economic structure of the bituminous mining industry has been built upon the payment of wages on the "face to face" basis. To now reconstruct the maximum hours and working time provisions applicable to bituminous coal mining, so as to cure the inequality due to different individual travel time, would create utter confusion in the economics and in the wage structure of the industry, which could only adjust itself to this new system over a period of years. The considerations involved in such a change, both economically and with reference to the fair treatment of the individual workers, are so complex that they could be satisfactorily worked out only by a long period of collective bargaining, if at all.

In normal times of peace it would be possible for the interested parties, and for impartial men, to give reasonable consideration to these complex problems, but at the present time, when the country, engaged in a wartime struggle for its very existence, the uncertainties and disturbances involved in working out such a plan would be intolerable. A time of war is no time to settle long standing and complex questions of this character. This is particularly true, as we pointed out in connection with the north-south differential in the Cotton Textile Cases, when a disturbance of long standing relationships established by years of collective bargaining would require us to disregard our responsibility to stabilize wage rates in conformance with the national stabilization program.

(2) In our directive order to May 25th, after ruling that no general wage increase could be approved, we spoke of the legal claim asserted by the Mine Workers for further compensation under the Fair Labor Standards Act. We referred that claim to the parties for further negotiation as a possible basis for agreement on some approvable wage increase, since payments due under the Fair Labor Standards

Act may be approved without regard to the wage stabilization policy defined by the Anti-inflation Act of October 2, 1942. It was however, made very clear in our directive order of May 25th that any wage increase based upon this claim could be approved, under the wage stabilization policy, only if the amount of the increase were genuinely and reasonably related to the claim advanced by the Mine Workers under the Fair Labor Standards Act. We said that the proposed settlement must be submitted with supporting data "sufficient to enable the Board to determine whether or not it constitutes a genuine settlement of alleged claims arising under the Fair Labor Standards Act, and not an indirect wage increase in violation of the wage stabilization policies."

In the negotiations following our order of May 25th the representative of the mine workers continued to insist upon a general wage increase of $2.00 a day. No real attempt was made to relate this amount to any amount of compensation that might be due under the Fair Labor Standards Act. The representatives of the mine workers failed to make any report to the Board on those negotiations. The representatives of the operators were unable to submit to the Board any data by which the Board might determine what amount of wage increase would constitute a genuine settlement of the alleged claim.

The mine workers' demand of $2.00 a day was, as we were informed, based upon an assumption or estimate that the travel time amounted on the average to an hour and one-half a day; that this travel time should be paid for at the rate of time and one-half because the Appalachian Agreements, which provided no pay for travel time, did provide a premium rate of time and one-half for productive working time beyond 35 hours a week. In this way the amount was brought up to an estimated average of $2.25 a day for each underground worker. The United Mine Workers proposed

to spread this amount over all the workers including those who did not go underground, and so arrived at the proposed general wage increase of $2.00 for all mine workers. We understand that the Mine Workers subsequently indicated to the Operators a willingness to reduce their demand to $1.50 a day, and that still later in negotiations with the Central-Pennsylvania Coal Producers Association there was a tentative agreement upon a further reduction to $1.30 per day.

It is obvious that these figures are out of all proportion to any amount that could possibly be due to the mine workers under the Fair Labor Standards Act, even if the courts should decide all questions in controversy in favor of the mine workers. The demand is plainly and unmistakably a demand for an "indirect wage increase in violation of the wage stabilization policies," contrary to the Board's directive order of May 25, 1943.

The overtime payment due to an individual mine worker, on the assumption that travel time is working time, under the Fair Labor Standards Act, may be calculated in accordance with the standard method used by the Wage and Hour Division (See Method A in footnote). Under this method the straight-time weekly earnings are divided by the actual hours worked plus the hours spent in traveling to and from the work place to the entrance to the mine. Work and travel hours of 40 and under are compensated at the computed straight-time average hourly rate and hours over 40 at time and one-half the hourly rate. From the sum of straight-time and overtime earnings the actual earnings under the wage contract are subtracted, the remainder constituting the payment required under the Act. For a miner paid at the rate of $1.00 an hour under the Appalachian Agreement for work at the face, the extra compensation for a 6-day week for travel time of one hour or less would be zero and for one and one-half hours would be

$1.02. The total liability of any operator under the Fair Labor Standards Act would be the sum of his liability to those workers whose travel time amounted to one hour per day or more. To average the travel time of all mine workers and use that average figure for travel time in the Wage and Hour Division's method of calculation would not measure the operator's liability at all.

Thus, the opportunity we gave to the Mine Workers and the Operators to work out a reasonable settlement of the claim under the Fair Labor Standards Act was not taken advantage of, and they did not reach a settlement. We cannot force upon them a settlement of a lawsuit which we have no power to decide.

As we pointed out in our directive order of May 25, it is not within the province of the National War Labor Board to determine whether or not the law requires payment for all time spent underground in the bituminous coal mines. If the United Mine Workers, or any individual miners seek a settlement of the dispute as to the legal rights of bituminous mine workers to additional compensation under the Fair Labor Standards Act, the Wage and Hour Division of the Department of Labor is the government agency provided for the settlement of such questions subject, of course, to court review as provided by Section 10 of that Act. Our Executive Order No. 9017 "does not apply to labor disputes for which procedures for adjustment or settlement are otherwise provided until those procedures have been exhausted," and it provides that "nothing herein shall be construed as superceding or in conflict with the provisions of . . . the Fair Labor Standards Act."

METHOD A

a. Weekly earnings at straighttime (42 hours x $1.00) ..... =$42.00

b. Average hourly earnings $42.00 : 48) ..... = .875
c. Straight-time earnings for 48-hour week (40 x $.875) ..... = 35.00
d. Earnings for hours over 40 at time and one-half (8 x $1.312) ..... = 10.50
e. Total earnings for purposes of F. L. S. A. (c : d) ..... = 45.50
f. Total earnings under present wage contract = 45.50
g. Extra compensation for travel time ..... = 0

As we pointed out in our Directive Order, it is possible at any time, should the parties ever agree to a settlement of this legal claim, for the National War Labor Board to pass upon it and to say whether or not the amount agreed upon is an allowable wage increase representing a genuine settlement of the claim, or a hidden wage increase contrary to the stabilization program. The distribution of the payment involved in any such settlement is a matter for the Wage and Hour Division to approve or disapprove.

WHY THE MINE WORKERS' DEMAND FOR A GENERAL WAGE INCREASE CANNOT BE APPROVED

In the directive order of May 25th, we decided that no general wage increase for the mine workers could be approved under the Act of October 2, 1942 and the relevant Executive Orders, Regulations and Policies. This national stabilization policy applies, of course, to the mine workers as well as to all other wage earners in the country.

It has been asserted that the mine workers undergo such hardships and earn such low wages that they are entitled to special treatment, out of line with and beyond the limitations of the national stabilization policy. Because of this the Board feels that in this opinion there should be set forth

in greater detail the reasons why the mine workers' demand for a general wage increase cannot be approved by the Board.

There are, within the wage stabilization policy, certain circumstances under which special wage adjustments to groups of industrial workers may be approved, even though the wages of these workers have already been increased 15 per cent or more since January 1, 1941.

(1) Wage earners whose wages are insufficient to maintain a decent standard of living may, under this policy, have their wages increased.

But the minimum wage for any mine workers under the present Appalachian agreements is 73.6 cents an hour, and for able-bodied mine workers the minimum is 85.7 cents an hour. That hourly wage rate is certainly above any level that could be thought of as insufficient to maintain a decent standard of living.

(2) Wage increases may be made to correct relatively low wage rates within a wage structure where there are substantial inter-plant inequalities such as to give rise to justifiable dissatisfaction among a particular group of workers whose low wage rates amount to unfair discrimination.

In the Appalachian Agreement, however, relative wage rates for different occupations have been carefully worked out by many years of collective bargaining. No objection has been raised by the Mine Workers to these relative rates except in the occupations of greasers, trappers, flaggers, switch-throwers, and slate pickers. This objection has been recognized and taken care of by the Board's Directive Order which provides that all able-bodied workers in these classifications shall be paid not less than .857 per hour and $6.00 per day.

(3) The War Labor Board, under the supplemental directive issued by the Director of Economic Stabilization

on May 12, 1943, is authorized to approve within carefully specified limits non-inflationary wage adjustments made with reference to prevailing wage rates in the same industry, or even in other industries where there are comparable occupati s. Except in rare and ususual cases such adjustments cannot be above the minimum going wages found by the Board to be sound and tested going rates paid for similar occupations in the labor market area. The adjustments must in all ordinary cases be made within the existing price structure or within the existing levels of production cost. If the Board in an exceptional case approves wage adjustments which effect price ceilings or increase production costs above the levels prevailing in comparable plants or establishments, then such adjustments do not become effective unless and until they are also approved by the Director of Economic Stabilization.

There is no basis for wage increases to the bituminous mine workers under this inter-plant or inter-industry rule. Basic wage rates are established throughout the bituminous coal industry by negotiated agreements based fundamentally upon the agreed wage rates in the Appalachian area. There are, therefore, no higher wage rates for similar occupations anywhere within the bituminous coal industry, upon which the Board could base an approval for a wage increase to these mine workers.

In our directive order of May 25th, the hours and earnings of bituminous coal miners were compared with those in other industries. It was pointed out that when the increased demand for coal to meet war requirements and the arrangements for operating the mines on a 6-day week are taken into account, the hourly, weekly, and weekly, and annual wages of the bituminous coal miners make a very favorable showing with similar earnings reported for industrial workers in other industries.

As we said in the comments accompanying that directive order, the mine workers have already received an average increase in straight-time hourly earnings of 18.2 per cent since January 1, 1941. With the provision for a 6-day week and the war time time demand for bituminous coal, the mine workers in March, 1943, were able to secure an average weekly take-home of $42.97 for a work week of 38.3 hours which is 65.3 per cent greater than their average weekly take-home in January, 1941, when they averaged 29.7 hours per week. Most of this increase was due to the substantial rise in weekly hours of work. "Assuming that this increase of weekly hours of work will continue through 1943, under the operation of the 6-day week and the war mine workers in March, 1943, were able to secure an average annual income for 1943 will be over $2,150 which is 77.4 per cent greater than in 1940 and 23.8 per cent greater than in 1942."

Taking the industry as a whole, mine workers under the 6-day week who, as in March 1943, work about 38 hours per week at the hourly rates provided for in the Appalachian Agreements as amended by the Directive Order of the Board, may expect weekly earnings which will exceed their weekly earnings n March 1941—just prior to the April 1st wage increase of $1.00 or $1.40 a day—by 60.5 per cent. Measured in terms of the increases not merely in food but in all the items which go to make up the mine workers' cost of living, this increase amounts to 32.3 per cent above March, 1941.

It is quite true that these figures are statistical averages without much appeal to the individual worker who has difficulty in making both ends meet. But it cannot be overlooked that these statistical averages truly reflect the present economic conditions of the workers in the bituminous coal industry, as compared with the conditions under which

they have heretofore lived, and as compared with the wage rates and incomes of workers in other industries.

There is no doubt that the mine workers have in the past suffered very great hardships from low wages and sub-standard living conditions, but in the period since 1932—the low point of the pre-war depression — their average weekly earnings have risen progressively step by step from a deeply substandard level of approximately $14.00 a week in 1933 to approximately $43.00 a week in March, 1943, which puts the mine worker up among the higher paid workers in the war industries.

The further wage increase of $2.00 a day demanded now by the Mine Workers is an additional increase of 28.6 per cent on top of the average increase of 18.2 per cent which these wage earners have already received since January 1, 1941, or a total increase of 46.9 per cent.

It is obviously impossible for the War Labor Board to approve any such increase for the mine workers under the national wage stabilization policy. To approve it would fly in the face of decision after decision of this Board in which we have had to limit the wage increases allowed to the wage earners in most of the great war industries of the country.

Any such departure from the general rule would destroy the whole wage stabilization program. It would defeat its own ends. The resulting increases in costs of production could only have the effect to further increase all prices, including particularly farm and food prices, to levels which would nullify the wage increases. It would expose the mine workers themselves to a renewed danger that their payroll dollars would be reduced to small change before they get to the grocery store.

NEGOTIATING CONDITIONS INSISTED UPON BY THE UNITED MINE WORKERS

The War Labor Board cannot fail to note that, by the insistence of the United Mine Workers, the negotiations for the new Appalachian Agreements have been carried on under conditions which violate the national no-strike agreement and are in themselves a defiance of the national wage stabilization policy.

The effect of the national no-strike agreement has been, in all other labor disputes in all other industries in America, that the War Labor Board has been able to carry on its consideration of the dispute free from the coercive pressure that results in war time when vital war production is interrupted or threatened with interruption.

In normal times a strike or a threat to strike is a recognized and permissible accompaniment to collective bargaining. The National Labor Relations Act provides that "nothing in this Act shall be construed so as to interfere with or impede or diminish the right to strike." In the national no-strike agreement this recognized right was deliberately laid aside by American labor for the duration of the war. The War Labor Board was created as a war agency empowered, by agreement, finally to determine industrial disputes without interruptions of war production.

It is one thing to use against an employer the economic pressure of a strike in peace time. That pressure has normally an effect limited to economic considerations affecting the individual employer or group of employers. In time of war an interruption of vital war production has an entirely different effect. It become a coercive pressure with all the intensity of a destructive attack upon the national welfare. It is for that reason that, in the statement unanimously adopted by the War Labor Board on June 2, 1943,

we spoke of "the overhanging and intolerable threat of strikes interrupting war production."

In this dispute the United Mine Workers, under the leadership of Mr. Lewis, have repudiated the no-strike agreement and insisted upon coming to the bargaining table with their demands in one hand and in the other hand the threat of a strike in an industry which affects the war production more vitally, perhaps, than any other industry. They have sought to use that threat, including the actual interruption of essential war production, to secure for themselves a favored position at a time when all responsible labor organizations in America have loyally adhered to the no-strike pledge.

The War Labor Board will not participate in any such proceedings, and it will not, under such pressure, approve for the mine workers a wage increase which, for the vital purpose of protecting the wage-earner's dollar, has been denied to wage-earners in other industries.

SPECIAL CONCURRING OPINION

This writer concurs in all the views expressed in the majority opinion. However, for purposes of emphasis, he wishes to make the following comments:

1. In the Directive Order of May 25, 1943, the Board ruled that under the wage stabilization policies established by the Act of Congress of October 2, 1942, and Executive Orders 9250 and 9328, the Mine Workers are not entitled to a general wage increase in the instant case. The record is clear that the straight time hourly wage rates for miners have increased more than 15 per cent since January 1, 1942, and, therefore, the miners are not entitled to a general wage increase under the "Little Steel" formula. Neither are they entitled to a general wage increase to correct substandards

of living because the wage rate of $1.00 per hour with resulting weekly earnings under the existing sixday-week arrangement of more than $40.00 cannot be considered substandard wages.

There is no evidence in the record which would justify a general wage increase in this case under that criterion in the National wage policy which permits of increases to correct gross inequities. To the contrary, the record shows that the hourly rates and the earnings of the miners under present production demands compare favorably with wages in other industries. It is true that the wages in a few other industries such as shipbuilding, automobile, and petroleum refining, are higher, but when the wages of the Mine Workers are compared with American industry generally, it cannot be said that any gross inequities exist which justify giving a general wage increase at this time in excess of the "Little Steel" formula.

Likewise, a general wage increase cannot be justified on the ground that it is needed to aid in the effective prosecution of the war because, as this writer stated in his decision of October 16, 1942, in the Ford case:

> "It would be a reflection upon the patriotism of the . . . employees to attempt a justification of a general wage increase upon the basis of any argument that such an increase should be granted . . . to aid in the effective prosecution of the war. An 'all-out' production effort on the part of American workers does not have to be bought or bribed by inflationary general wage increases, which in turn, endanger our war economy and in the long run, decrease real wages."

2. In the Board's decision of May 25, 1943, it pointed out that any wage adjustments made by the parties in compliance with the Fair Labor Standards Act would be consistent with the National wage stabilization policy. It told

the public that any composition which the parties made in settlement of any legal claim under the Fair Labor Standards Act as to travel time from portal to portal would be approved if supported by data showing that the composition was a genuine settlement of an alleged legal claim and not an indirect wage increase in violation of the Board's wage stabilization policies.

However, the Board made it perfectly clear that it is not within the province of the Board to determine whether the Fair Labor Standards Law requires payment for all time spent underground. Hence the Board referred to the parties for negotiations the matter of adjusting the union's legal claim to compensation for travel time from portal to portal. Unfortunately, the parties were unable to reach any agreement on the issue.

Therefore, the Board must rule that this legal question is one for court determination. If the War Labor Board should attempt to rule whether or not the Mine Workers are entitled to travel time as a matter of law under the Fair Labor Standards Act, it would be exceeding its jurisdiction by attempting to settle a legal claim which rests solely within the jurisdiction of the courts under the Fair Labor Standards Act. This the Board will not do.

3. It should not be overlooked that the President of the United Mine Workers of America has rested his claim to portal to portal travel time pay on the theory that the Mine Workers are entitled to such pay as a legal right. He has cited the decision of the Fifth Circuit Court of Appeals in the *Tennessee Coal, Iron and Railroad Company case,* decided March 16, 1943, in support of this contention. However, Mr. Lewis' demand in fact has not been for the actual travel time spent by the individual miner underground, but for an adjustment of travel time pay to be distributed in an equal amount to all the Mine Workers, including

those above and below the ground, irrespective of whether the individual Mine Worker actually travels underground.

Thus, Mr. Lewis' demand has not been for compensation for any legal claim that the individual miners may have, but rather, it is a demand for a wage increase for all the miners in excess of the wage stabilization policies of the Board couched in terms of portal to portal pay. It is a demand for a form of payment which could not possibly be collected under the Fair Labor Standards Act, because the very decision which the representatives of the Mine Workers cite makes clear that the portal to portal travel time pay allowed in that case is individual to the employee who travels underground in accordance with the time which he actually travels.

It would be thoroughly dishonest for the War Labor Board in the name of portal to portal pay to grant a wage increase to all the miners, including those who travel underground and those who do not. Any pay which the courts might decree the individual miners had coming for the actual time they travel underground could not be ordered by the War Labor Board to be averaged among all the mine workers in the absence of an agreement between the parties to that effect. Any such award by the Board would be recognized for what it really would be; namely, an unjustifiable rationalization for breaking the wage stabilization policy of the Board in order to satisfy the demands of the miners for a general wage increase. Such an action would open the flood gates of general wage increases in excess of the wage stabilization policies of the Government because if the United Mine Workers of America should succeed in securing such a wage increase from the Board, many other unions would attempt, with justification, to adopt the same tactics and demand general increases under one label or another.

Throughout the history of this case, the War Labor

Board has taken the position that the same policies, the same rules, and the same procedures must be applied by the War Labor Board to this case as to all other cases which have come before the Board. It has followed the principle that it must decide all cases on the theory that this is a government of one law and one flag, with equal justice to all. Having found that the facts of the case do not justify a general wage increase under any of the criteria set forth in the Executive Orders which define the wage stabilization policies of the Government, the Board does not propose to circumvent those policies by granting a general wage increase indirectly or by subterfuge under the guise of portal to portal pay averaged over all the workers.

4. Lastly, this writer wishes to point out that the Board has not been diverted from applying the same rules to this case as to all other cases by the union's resort from time to time to economic action and threats of economic action. It has insisted on seeing to it that the miners receive all that they are entitled to under the wage stabilization policies of the Government in accordance with the record before it, but it has held fast to the principle that they should not receive more than they are entitled to, even though they threaten the use of economic power.

As a result of the economic action taken by the United Mine Workers of America and their officers in violation of the no-strike pledge, there is one issue which has developed in this case which surpasses all others in significance so far as the security of this nation is concerned; namely, whether or not in the midst of a war the Mine Workers will abide by the same rules and the same laws which are applicable to all other groups. If this issue involving the supremacy of law should ever be sacrificed at the altar of expediency or under coercion of power, the damage to the war effort would be much more costly not only to the national morale, but also to actual war production than would be the losses,

unthinkable as they are, which would result from a coal strike. It is one issue which cannot be compromised if we are to retain a government by law. This writer is confident that 130,000,000 Americans do not want it compromised in this case or in any other.

Opinion by
WAYNE L. MORSE.